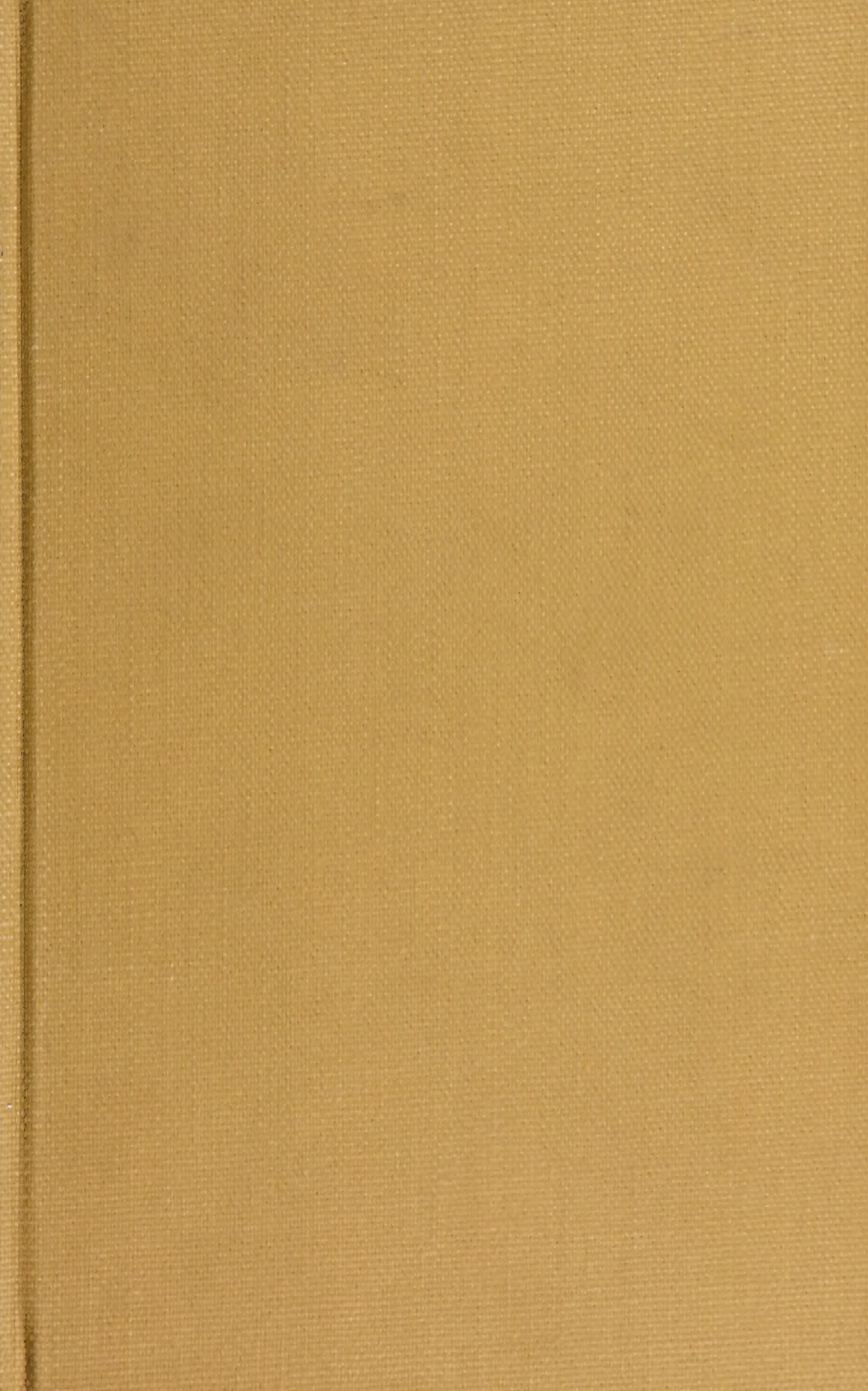
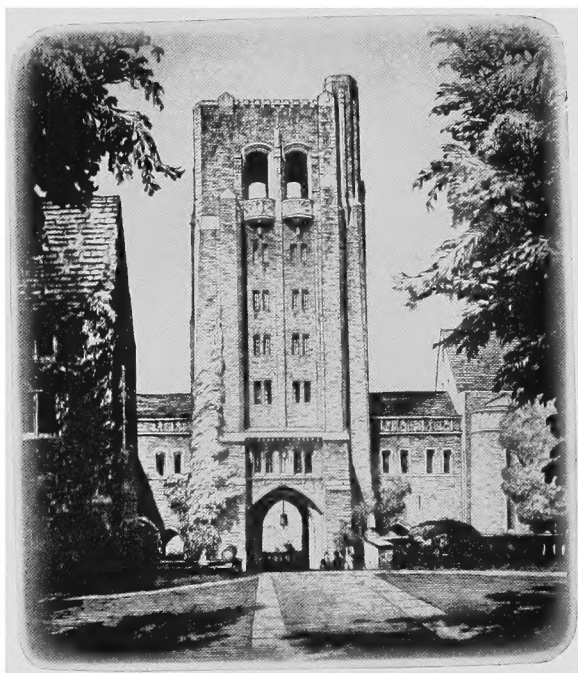




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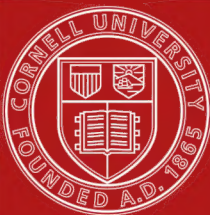
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A TREATISE
ON THE
LAW OF RAILROADS.

BY
EDWARD L. PIERCE.

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P R E F A C E.

I SUBMIT this volume to the profession, with the hope that it will be found to contain a compact statement of the Law of Railroads. My first book, written with the same view, was published in 1857. At that time the subject had not been treated in this country, and even the Law of Torts had not been made the special topic of any treatise either in England or the United States. I have made attempts at different times to prepare a new edition of the earlier book, but various engagements prevented the continuous study which was required for the purpose. Meantime, the subject developed so much in several directions, and the matter which was at hand in 1857 became so overlaid with later decisions, that, in order to make a complete statement of the law as it is, it became necessary to undertake a new treatise, instead of preparing a new edition of the earlier one.

The treatment of the subject is embarrassed by the multitude of authorities. The profession is exacting in requiring an author to put at its ready command all the decisions of all the States, thus making it possible to trace at once those bearing closely on a pending question on which advice is to be given or a brief prepared. No principle of selection which he could adopt would prove generally satisfactory to those whom he endeavors to assist. The result is that the mere citation of cases, in the space they fill, rivals in some chapters the text itself. There

will be no remedy for this disproportion between text and notes until there is greater moderation in writing and publishing opinions, many of which are, without apparent reason, extended to a great length, or are mere repetitions of what the same court has already affirmed. If the present disposition to multiply reports should continue to the extent to which it has prevailed for the last twenty years, it is fearful to contemplate what an enormous mass of material, in the shape of judicial opinions, is to accumulate in time to come.¹ Such fecundity has no parallel in any other profession or department of human thought.

I have made few extracts from judicial opinions, for the reason that, being found in the reports, it is generally superfluous to repeat them in a treatise. When the author has stated the doctrine of the decisions in his text, and made full references, he ought not, as it seems to me, to enlarge his work, merely for the purposes of amplification and illustration, with matter which is already before the public and is in no respect the fruit of his own mind. To this rule there are exceptions; and I have departed from it, though reluctantly, in a few instances, particularly in the chapter on "The Powers of the Corporation," where an attempt is made to simplify the discussion to which the modern doctrine of *ultra vires* has given rise.

The scope of the book does not admit a critical treatment of particular cases. Their aggregate number is so great, and is increased to such an extent from year to year, that no one case has the relative importance which a leading case had at an earlier period of the law. The most that an author can do in writing a book like this, which includes chapters on various divisions of the law, and treats questions many of which provoke strenuous and perpetual controversy in the courts, is to give the resultant force of the decisions; and, having stated the

¹ The reports of the decisions of the Supreme Court of Illinois for 1875 fill five volumes and a part of another, making an aggregate of 3,678 pages.

main doctrine with proper qualifications and illustrations, to leave the profession to analyze and distinguish the cases for themselves.

The English decisions have been cited wherever they seemed to throw light on the law as held in this country; but for reasons which are indicated on pp. 525, 526, and in the preface to my earlier book, I have given them a less prominent place than is usually assigned to them in treatises, and few propositions of the text depend on them alone for support.

The topics of the mortgages of railroads and franchises, and of the liability of railroad companies as common carriers, have not been included in this volume.

E. L. P.

Boston, February 14, 1881.

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THE LAW OF RAILROADS.

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CHAPTER I.

THE EXISTENCE OF THE CORPORATION.

Definitions. — A corporation is an artificial being, created by law, and composed of individuals, who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting in several respects as a natural person.¹ The right of being and acting as a corporation is a franchise granted by the sovereign power. The body thus created has an identity distinct from that of the individual corporators; and its property, rights, and liabilities are distinct from theirs.² A corporation is private when founded by private individuals, or its stock is owned by them; and it is public when it is created for the purposes of government, or the whole interest is in the public. The charter of a private corporation, unlike that of a public corporation, is a contract, the obligation of which cannot, under the Constitution of the United States, be impaired by State legislation.³

Railroad companies are private civil corporations, and may be created by special acts of legislation or established under general laws.⁴ They are called more specifically commercial and busi-

¹ 2 Kent Com. 287. A corporation's survival of changes in membership has been thought to be better expressed by the terms "continuous identity" than by those of "perpetual succession," as unlimited duration is not an essential condition of corporate existence. Green's Brice's *Ultra Vires* (2d Am. ed.), p. 8.

² The stockholder has no legal interest in the property of the corporation.

Morgan v. New Orleans, M., & C. R. Co., 1 Woods, 15.

³ *Dartmouth College v. Woodward*, 4 Wheat. 518; 2 Kent Com. 275.

⁴ *Sweatt v. Boston, H., & E. R. Co.*, 3 Clifford, 339. A company may be a railroad corporation within the meaning of statutes, although authorized to do other kinds of business than transportation by railroad. *Kentucky Improvement Co. v. Slack*, 100 U. S. 648.

ness corporations, to distinguish them from eleemosynary corporations.¹ They are invested with the usual privileges and incidents of corporations, and with certain peculiar and extraordinary powers necessary for effecting the purposes for which they are established.²

A private individual may construct and work a railroad, if he can obtain a right of way by purchase.³ Such private railroads may be built by a person on his own land, or on the land of another by purchase of a right of way, or by reserving a way-leave over lands sold or demised.⁴ The early legislation for railroads in the United States contemplated iron turnpikes, to be used by private persons, with their carriages, upon payment of tolls, but this mode of working them was found to be impracticable.⁵ They were sometimes declared by statute to be public highways; and the company furnished the motive power, while individuals put their own cars on the tracks.⁶ They are now, when designed for public use, constructed and managed usually by corporations, though sometimes by the State, or by individuals, trustees of bondholders, or receivers acting under judicial appointment.

Mode of creating the Corporation. — Formerly, corporations were usually created by special acts of legislation, called charters, which enumerated at length their powers and duties;⁷ and the charters of corporations of the same kind were, in the same State, quite uniform in many of their provisions.⁸ General laws, from

¹ *Sweatt v. Boston, H., & E. R. Co.*, 3 Clifford, 339, 347, 348.

² The powers and privileges of corporations are called franchises. For recent definitions of the term "franchises" see *Morgan v. Louisiana*, 93 U. S. 217, 221; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 365.

³ *Bank of Middlebury v. Edgerton*, 30 Vt. 182, 190; *Stewart's Appeal*, 56 Pa. St. 413; *McCandless's Appeal*, 70 Pa. St. 210; *Brand v. Hammersmith & C. R. Co.*, L. R. 2 Q. B. 223, 232, L. R. 4 H. L. 171.

⁴ *Dand v. Kingscote*, 6 M. & W. 174; *Farrow v. Vansittart*, 1 Eng. R. & C. 602; *Barnard v. Wallis*, 2 Eng. R. & C. 162; *Walford on Railways*, pp. 2-10; *Wilson v. Cunningham*, 3 Cal. 241.

⁵ *Commonwealth v. Fitchburg R. Co.*, 12 Gray, 180.

⁶ *Trunick v. Smith*, 63 Pa. St. 18.

⁷ No particular form of words is required to create a corporation. *Commonwealth v. West Chester R. Co.*, 3 Grant, 200. A grant of corporate powers has such an effect: *Ib.*; *Angell & A. on Corp.* §§ 76, 77; 2 Kent Com. 276; but the statute must contain language indicating an intention to create a corporate body. *Shelton v. Banks*, 10 Gray, 401. While a legislative recognition cures defects of organization, it will not alone create a corporation. *Attorney-General v. Railroad Cos.*, 35 Wis. 425, 602. The recognition of a corporation formed by the union of two corporations gives validity to the consolidation. *Mead v. New York, H., & N. R. Co.*, 45 Conn. 199, 218.

⁸ See "Index of the Special Railroad Laws of Massachusetts, 1826-1873," by E. L. Pierce, Boston, 1874, pp. 493; also "Table of Railroad Charters" of New

time to time, enacted provisions applicable to all corporations, or to those of a certain class; and the effect of such laws has been to reduce the essential provisions of each charter to a smaller number of particulars.

General Laws authorizing the Formation of Corporations.—In several States, general laws for the formation of railroad corporations have dispensed with applications to the legislature for special acts of incorporation. Such laws were enacted in New York in 1848 (later act in 1850), in Illinois in 1849, Ohio in 1854, Michigan in 1855, and Massachusetts in 1872. Generally, they prescribe that individuals, not less than a number stated, are to sign articles of association, which name certain provisional directors, and set forth several particulars descriptive of the enterprise, such as termini, route, and amount of capital stock, each agreeing to take a certain amount of the stock, and paying for a per cent of the same in cash to the directors or their treasurer; and that the articles of association, with proper affidavits, are to be filed in some public repository, as the office of the Secretary of State, or with some local recording officer. The filing or recording, with the addition, perhaps, of the certificate of some public officer that the statutes have been complied with, has the effect of a charter, and creates the corporation.¹ In some States the directors are required, as preliminary to the recording and certificate, to determine the route by agreement with the local authorities, while in others it is sufficient to state in the articles the cities or towns in which the railroad is to be maintained, leaving to subsequent proceedings to determine the precise route. Where the legislature creates a railroad corporation, it decides in each case the utility of the enterprise; while, under general laws for the formation of railroad companies, the subscribers themselves may be allowed to decide it. It is assumed by such general legislation that the risk which the subscribers undertake in advancing and pledging capital is sufficient proof of the public exigency and of their good faith.

The general law in some cases authorizes, in the first instance, a provisional association with limited powers, which is to become

York in McMaster's "New York Railroad Law;" "Railroad Laws and Charters," Boston, 1851.

¹ Cincinnati, L., & C. R. Co. v. Danville & V. R. Co., 75 Ill. 113.

a corporation on the performance of certain conditions, such as the payment or subscription of a certain amount of capital stock.¹

Several copies of the articles of association, signed by different subscribers, will be treated as one set.² A substantial compliance with the statute is sufficient to make the organization valid.³ The subscription of a firm name is a compliance with a statute requiring each subscriber to subscribe "his name."⁴ An estimate of the length of the road being required, an approximate one is sufficient.⁵ Corporate existence is not defeated by the omission of a clause in the affidavit stating the intent of the subscribers,⁶ or by an insufficient or incorrect statement of the termini and route,⁷ or the withdrawal of incorporators after the corporation has come into existence,⁸ or the omission of the names of the directors in the articles;⁹ but the articles, unless complete in substance, will not hold the subscribers.¹⁰ Non-resident persons may, unless excluded by the terms of the statute, be original incorporators.¹¹

Whether any particular parcel of land is required for corporate purposes is, within certain limits, often left to the discretion of the company which is created under such a general law; but the exercise of such discretion may be subject to revision by a court or special tribunal.¹²

In some States the constitution prohibits the creation of corporations, except under general laws. This provision does not prohibit the legislature from passing a special act, changing the name of an existing corporation, or giving it power to purchase additional property.¹³

Acceptance of the Grant.—Individuals cannot be made corporators against their will; and in order to create a private corpo-

¹ *Allman v. Havana, R., & E. R. Co.*, 88 Ill. 521; *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385.

² *Lake Ontario, A., & N. Y. R. Co. v. Mason*, 16 N. Y. 451.

³ *People v. Stockton & V. R. Co.*, 45 Cal. 306.

⁴ *Ogdensburg, R., & C. R. Co. v. Frost*, 21 Barb. 541.

⁵ *Buffalo & P. R. Co. v. Hatch*, 20 N. Y. 157.

⁶ *Buffalo & A. R. Co. v. Cary*, 26 N. Y. 75.

⁷ *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185, 5 Thomp. & C. 659.

⁸ *Busey v. Hooper*, 35 Md. 15.

⁹ *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404.

¹⁰ *Dutchess & C. R. Co. v. Mabbett*, 58 N. Y. 397; *Monterey & S. V. R. Co. v. Hildreth*, 53 Cal. 123.

¹¹ *Central R. Co. v. Penn. R. Co.*, 4 Stewart (N. J.), 475, 5 Stewart (N. J.), 755.

¹² Act of New York, 1850, ch. 140, §§ 14, 15; Act 1869, ch. 260; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137.

¹³ *Wallace v. Loomis*, 97 U. S. 146.

ration there must be an acceptance of the grant by the grantees.¹ The grant may be withdrawn before the acceptance, even where there is no reserved power of withdrawal.² The acceptance, in order to be effective, must be unconditional and complete.³ The grantees, by their acceptance of the charter or of an amendment, take it as a whole, *cum onere*.⁴ The acceptance, unless a mode is prescribed by statute, may be implied as well as express;⁵ and none is required where the parties to whom the grant was made applied for it.⁶

The acceptance may be implied from acts indicating an intention to accept, — as from the use of corporate powers, and the performance of corporate acts authorized by the grant.⁷ The acceptance of new grants or amendments by an existing corporation may likewise be express or implied, and, when beneficial, is to be presumed.⁸ The acceptance of a charter is presumed only when it names the incorporators, and the conditions precedent have been complied with.⁹ It may be shown by corporate acts which without such new grant or amendment would be unlawful.¹⁰ An express acceptance may be made by a majority of the stockholders;¹¹ or by the directors when the matter is within the scope of their authority, and the statute does not expressly or by implication require the action of the stockholders.¹² The validity of amendments which the corporation refuses to accept, or to which

¹ Angell & A. on Corp. §§ 81-87; *State v. Dawson*, 16 Ind. 40.

² *State v. Roosa*, 11 Ohio St. 16, 28; *Chesapeake & O. C. Co. v. Balt. & O. R. Co.*, 4 Gill & J. 1; *State v. Dawson*, 16 Ind. 40.

³ Angell & A. on Corp. § 85.

⁴ *Rex v. Westwood*, 4 B. & C. 781; *Kenton County Court v. Bank Lick Turnp. Co.*, 10 Bush, 529. See, as to acceptance of the charter in the case of conditions precedent which are essential to corporate existence, *Lyons v. Orange, A., & M. R. Co.*, 32 Md. 18; *Perkins v. Sanders*, 56 Miss. 733, 738, 739.

⁵ *Illinois River R. Co. v. Zimmer*, 20 Ill. 654, 661; Angell & A. on Corp. § 83.

⁶ *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385; *Perkins v. Sanders*, 56 Miss. 733; *State v. Dawson*, 22 Ind. 272.

⁷ *Lyons v. Orange, A., & M. R. Co.*, 32 Md. 18; *New Central Coal Co. v. George's Creek Coal & I. R. Co.*, 37 Md. 537, 556; *Dayton & C. R. Co. v. Hatch*, 1 Disney, 84; *Goodin v. Evans*, 18 Ohio St. 150;

Covington v. Covington & C. Bridge Co., 10 Bush, 69; *Thorington v. Gould*, 59 Ala. 461; *Hope Mut. Fire Ins. Co. v. Beckmann*, 47 Mo. 93; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

⁸ *Bangor, O., & M. R. Co. v. Smith*, 47 Me. 34.

⁹ *Attorney-General v. Railroad Cos.*, 35 Wis. 425, 601.

¹⁰ *Kenton County Court v. Bank Lick Turnp. Co.*, 10 Bush, 529; *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228, 3 Mo. App. 315.

¹¹ *Durfee v. Old Colony & F. R. R. Co.*, 5 Allen, 230; *New Orleans, J., & G. N. R. Co. v. Harris*, 27 Miss. 517; *Joy v. Jackson & M. Plank Road Co.*, 11 Mich. 155.

¹² *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125; *Dayton & C. R. Co. v. Hatch*, 1 Disney, 84; *Mutual Fire Ins. Co. v. Stokes*, 9 Phil. (Pa.) 80; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Illinois River R. Co. v. Beers*, 27 Ill. 185; *Goodin v. Evans*, 18 Ohio St. 150; Angell & A. on Corp. § 84; *post*, p. 33.

some portion of the stockholders object, depends upon the power of the legislature to amend charters.¹

Essential Conditions of Existence.—A corporation may exist and remain in the full enjoyment of its franchises, notwithstanding irregularities in its creation, and its neglect of statute requirements in its organization and proceedings.² Thus, the non-payment of the instalment required by law to be paid at the time of the subscription does not prevent corporate existence;³ but, if made a condition precedent, the proceedings may for want thereof be declared invalid on *quo warranto*.⁴ The subscription of the whole amount of the capital stock is not essential to such existence, unless made so by statute.⁵ The conditions which the statute makes essential to corporate life must be complied with.⁶ A subscription to the articles of a manufacturing corporation may be essential to its existence, while the filing of a certificate of organization in a public repository may not be.⁷ But in the case of railroad corporations created under the usual provisions of general laws, the recording of the articles of association (and the issue of a certificate of such recording, where one is required) seems essential to corporate existence.⁸ If the conditions necessary to corporate existence and organization have not been complied with, the company cannot proceed to take land under statutes authorizing corporations to exercise the right of eminent domain.⁹

¹ *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56

² *Hughes v. Parker*, 19 N. H. 181, 20 N. H. 58; *Dooley v. Cheshire Glass Co.*, 15 Gray, 494; *Newcomb v. Reed*, 12 Allen, 362; *Walworth v. Brackett*, 98 Mass. 98; *South Meadow Dam Co. v. Gray*, 30 Me. 547; *Buffalo & A. R. Co. v. Cary*, 26 N. Y. 75; *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185, 5 Thomp. & C. 659; *Oroville & V. R. Co. v. Plumas County*, 37 Cal. 354; *Frost v. Frostburg Coal Co.*, 24 How. 278. See *ante*, p. 4.

³ *Commonwealth v. West Chester R. Co.*, 3 Grant, 200; *Eaton v. Aspinwall*, 19 N. Y. 119.

⁴ *People v. Chambers*, 42 Cal. 201.

⁵ *Minor v. Mechanics' Bank*, 1 Peters, 46.

⁶ *Lyon v. Orange, A., & M. R. Co.*, 32 Md. 18; *Williams v. Franklin T. A. Assoc.*, 26 Ind. 310.

⁷ *Utley v. Union Tool Co.*, 11 Gray, 39; *Merrick v. Reynolds Engine & G. Co.*, 101 Mass. 381; *Hawes v. Anglo-Saxon Petroleum Co.*, id. 385; *Augur Steel Axle & G. Co. v. Whittier*, 117 Mass. 451; *First National Bank v. Davies*, 43 Iowa, 424. But see *Bigelow v. Gregory*, 73 Ill. 197.

⁸ *Buffalo & A. R. Co. v. Cary*, 26 N. Y. 75; *Baile v. Calvert College Educational Soc.*, 47 Md. 117; *De Witt v. Hastings*, 40 N. Y. Superior, 463; *Jessup v. Carnegie*, 44 N. Y. Superior, 260; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416; *Indianapolis Furnace & M. Co. v. Herkimer*, 46 Ind. 142; *Nelson v. Blakey*, 47 Ind. 38; *Hunt v. Kansas & M. Bridge Co.*, 11 Kan. 412. See *Stone v. Great Western Oil Co.*, 41 Ill. 85; *Oroville & V. R. Co. v. Plumas County*, 37 Cal. 354.

⁹ *Atlantic & O. R. Co. v. Sullivant*, 5 Ohio St. 276; *Atkinson v. Marietta & C.*

Equity will enjoin the proceedings where subscriptions and payments essential to corporate life have not been made as required by law;¹ but it will not restrain a corporation *de facto* from exercising the corporate powers merely because of bad faith in its promoters or corporators, or of irregularities in its organization, or of the non-user or misuser of its powers.²

Organization.—The mode of organizing is usually prescribed by statute. Irregularities in organization cannot be taken advantage of collaterally.³ They may be waived by the State, and legislative recognition of the corporation as a subsisting one is such a waiver;⁴ but such a recognition does not of itself create a corporation where there is no corporation *de facto*.⁵ Fraud in the organization, or in the action of the promoters when applying for the charter, cannot be inquired into collaterally if at all.⁶ The power to organize is not exhausted by a first attempt which results in a defective organization.⁷ The power to take associates, given in the usual terms, confers a privilege, but does not impose a duty.⁸

R. Co., 15 Ohio St. 21; *Powers v. Hazelton & L. R. Co.*, 33 Ohio St. 429; *Brooklyn W. & N. R. Co.*, *In re*, 72 N. Y. 245, 75 N. Y. 335, 19 Hun, 314.

¹ *Jersey City Gas Co. v. Dwight*, 2 Stewart (N. J.), 242.

² *National Docks R. Co. v. Central R. Co.*, 5 Stewart (N. J.), 755, 4 Stewart (N. J.), 475; *Attorney-General v. Stevens, Saxton*, 369.

³ *Frost v. Frostburg Coal Co.*, 24 How. 278, 283; *Rice v. Rock Island & A. R. Co.*, 21 Ill. 93; *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237; *Cincinnati, L., & C. R. Co. v. Danville & V. R. Co.*, 75 Ill. 113; *Hanover Junction & S. R. Co. v. Haldeman*, 82 Pa. St. 36, 46; *Cochran v. Arnold*, 58 Pa. St. 399; *Commonwealth v. Cent. Pass. R. Co.*, 52 Pa. St. 506; *Aurora & C. R. Co. v. Lawrenceburg*, 56 Ind. 80; *Gill v. Kentucky & C. Gold & S. M. Co.*, 7 Bush, 635; *Swartwout v. Mich. A. L. R. Co.*, 24 Mich. 389, 394; *Taggart v. Western Md. R. Co.*, 24 Md. 563; *Eaton v. Aspinwall*, 19 N. Y. 119; *Lehman v. Warner*, 61 Ala. 455.

⁴ *Black River & U. R. Co. v. Barnard*, 31 Barb. 258; *New York Elevated R. Co.*, *In re*, 70 N. Y. 327; *Atlantic & P. R. Co. v.*

St. Louis, 66 Mo. 228, 3 Mo. App. 315; *St. Louis R. Co. v. Northwestern St. Louis R. Co.*, 2 Mo. App. 69; *Cowell v. Colorado Springs Co.*, 3 Col. 82, 100 U. S. 55; *Mead v. New York, H., & N. R. Co.*, 45 Conn. 199; *McAuley v. Columbus, C., & I. C. R. Co.*, 83 Ill. 348; *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237; *Mitchell v. Deeds*, 49 Ill. 416, 419; *Baltimore & O. R. Co. v. Marshall County*, 3 W. Va. 319.

⁵ *Attorney General v. Railroad Cos.*, 35 Wis. 425, 602.

⁶ *Garrett v. Dillsburg & M. R. Co.*, 78 Pa. St. 465; *Smith v. Miss. & A. R. Co.*, 6 S. & M. 179; *Powers v. Hazelton & L. R. Co.*, 33 Ohio St. 429; *State v. Fagan*, 22 La. An. 545. See, as to fraud in attempting to organize under a general law, *Paterson v. Arnold*, 45 Pa. St. 410; *National Docks R. Co. v. Central R. Co.*, 5 Stewart (N. J.), 755, 4 Stewart (N. J.), 475.

⁷ *Ladies Collegiate Institute v. French*, 16 Gray, 196.

⁸ *Hughes v. Parker*, 20 N. H. 58, 19 N. H. 181; *Frost v. Frostburg Coal Co.*, 24 How. 278. See *Lechmere Bank v. Boynton*, 11 Cush. 369.

A body which has organized and acted as a corporation is estopped from denying its corporate existence.¹ The estoppel, however, takes place only when the body has acted under color of law, and not where there is no law authorizing its creation, or there is a failure to comply with requirements essential to corporate existence.² A subscriber or stockholder who has participated in the proceedings of a *de facto* corporation, or otherwise acquiesced in its proceedings, is estopped from denying its existence or setting up irregularities in its proceedings.³ A party, by contracting with a corporation, admits its corporate existence.⁴

Proof of Existence.—The existence of a corporation may be proved by its charter (or, when created under a general law, by an equivalent record or certificate) and the use of corporate powers; and the subsequent acquisition of franchises may be proved in the same manner.⁵ Its competency to sue in that capacity is admitted by a plea of the general issue or a plea to the merits,⁶ but it must, as plaintiff, prove its corporate character when it is denied by a plea in abatement.⁷ Proof of organization and user is a sufficient

¹ Callender v. Painesville & H. R. Co., 11 Ohio St. 516; Racine & M. R. Co. v. Farmers' Loan & T. Co., 49 Ill. 331; Reynolds v. Myers, 51 Vt. 444, 455.

² Harriman v. Southam, 16 Ind. 190; Heaston v. Cincinnati & F. W. R. Co., id. 275; Gillespie v. Ft. Wayne & S. R. Co., 17 Ind. 243; Williams v. Franklin T. A. Assoc., 26 Ind. 310; Boyce v. Towson-town Station M. E. Church, 46 Md. 359.

³ Sanger v. Upton, 91 U. S. 56; Chubb v. Upton, 95 U. S. 665; Black River & U. R. Co. v. Clarke, 25 N. Y. 208; Buffalo & A. R. Co. v. Cary, 26 N. Y. 75; Phoenix Warehousing Co. v. Badger, 67 N. Y. 294, 6 Hun, 293; Swartwout v. Mich. A. L. R. Co., 24 Mich. 389; Monroe v. Ft. Wayne, J., & S. R. Co., 28 Mich. 272; Maltby v. North. W. Va. R. Co., 16 Md. 422; Montpelier & W. R. R. Co. v. Langdon, 46 Vt. 234, 45 Vt. 137; Hunt v. Kansas & M. Bridge Co., 11 Kan. 412; Hanover Junction & S. R. Co. v. Haldeman, 82 Pa. St. 36; Corwith v. Culver, 69 Ill. 502; Clarke v. Thomas, 34 Ohio St. 46, 62.

⁴ Black River & U. R. Co. v. Clarke, 25 N. Y. 208; Worcester Med. Institution v. Harding, 11 Cush. 285; Williams v. Cheney, 3 Gray, 215, 220; Topping v. Bickford, 4 Allen, 120;

Douglass County v. Bolles, 94 U. S. 104; Cochran v. Arnold, 53 Pa. St. 399; Mitchell v. Deeds, 49 Ill. 416; Callender v. Painesville, & H. R. Co., 11 Ohio St. 516; Anderson v. Newcastle & R. R. Co., 12 Ind. 376; Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275; Brownlee v. Ohio, I., & I. R. Co., 18 Ind. 68; Eppes v. Miss., G., & T. R. Co., 35 Ala. 33; Cowell v. Colorado Springs Co., 3 Col. 82, 100 U. S. 56; Cahall v. Citizens' B. Assoc., 61 Ala. 232; South Meadow Dam Co. v. Gray, 30 Me. 547.

⁵ Commonwealth v. Bakeman, 105 Mass. 53; South Meadow Dam Co. v. Gray, 30 Me. 547; Leonardsville Bank v. Willard, 25 N. Y. 574; De Witt v. Hastings, 40 N. Y. Superior, 463; Reynolds v. Myers, 51 Vt. 444; Swartwout v. Mich. A. L. R. Co., 24 Mich. 389, 394; Stone v. Great Western Oil Co., 41 Ill. 85.

⁶ Star Brick Co. v. Ridsdale, 7 Vroom, 229; Pullman v. Upton, 96 U. S. 328; Oldtown & L. R. Co. v. Veazie, 39 Me. 571; Penobscot & K. R. Co. v. Dunn, id. 587; Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275, 278.

⁷ Oroville & V. R. Co. v. Plumas County, 37 Cal. 354.

answer to a plea of *nul tiel* corporation; but a grant from the State must be shown in a direct proceeding for a forfeiture.¹ The corporation as a plaintiff need not aver its corporate character when it is indicated by its name.² Its books are evidence of its proceedings.³ The judgment of the court of a State, upon the question whether a corporation exists under its laws, will be taken as conclusive upon the question when raised in the courts of other States or of the United States.⁴

Termination of Corporate Existence. Repeal of Charter.—The legislature, having reserved the power to repeal the charter, may at pleasure terminate corporate existence;⁵ but, in the absence of such a reserved power, the charter cannot, under the national constitution, be taken away except for cause.⁶ If the reserved power is, by its terms, to be exercised only in case of a default or abuse of corporate powers, the legislature, it has been held, is not the final judge, whether such cause of forfeiture has occurred, and the question of default or abuse is still open to judicial inquiry.⁷ The repeal does not take away the rights of creditors and stockholders in the corporate property.⁸

Certainly in the absence of a reserved power of repeal, the

¹ Mitchell v. Deeds, 49 Ill. 416; Cincinnati, L., & C. R. Co. v. Danville & V. R. Co., 75 Ill. 113; Eaton v. Aspinwall, 19 N. Y. 119.

² O'Donald v. Evansville, I., & C. S. L. R. Co., 14 Ind. 259; Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275, 278; Kennedy v. Cotton, 28 Barb. 59; Miss., O., & R. R. Co. v. Gaster, 20 Ark. 455. As to the allegation in a criminal proceeding, see Burke v. State, 34 Ohio St. 79.

³ Ryder v. Alton & S. R. Co., 13 Ill. 516.

⁴ Secombe v. Mil. & St. P. R. Co., 23 Wall. 108; Jessup v. Carnegie, 80 N. Y. 441.

⁵ Thornton v. Marginal Freight R. Co., 123 Mass. 32; Lothrop v. Stedman, 13 Blatch. 134, 42 Conn. 583; Baltimore v. Pittsburg, & C. R. Co., 1 Abbott, U. S. 9; Mobile & O. R. Co. v. State, 29 Ala. 573; Bruffett v. Great Western R. Co., 25 Ill. 853; Western North Carolina R. Co. v. Rollins, 82 N. C. 523; State v. Miller, 1 Vroom, 368, 2 Vroom, 521; McLaren v. Pennington, 1 Paige, 102; Angell & A. on Corp. § 767.

⁶ Miller v. State, 15 Wall. 478; State

v. Northern Cent. R. Co., 44 Md. 131, 164; Campbell v. Miss. Union Bank, 6 How. (Miss.) 625, 653.

⁷ Crease v. Babcock, 23 Pick. 334; Commonwealth v. Essex Co., 13 Gray, 239, 253; Chesapeake & O. Canal Co. v. Balt. & O. R. Co., 4 Gill & J. 1, 122; Erie & N. E. R. Co. v. Casey, 26 Pa. St. 287, 1 Grant, 274; Commonwealth v. Pittsburg & C. R. Co., 58 Pa. St. 26, 46; Delaware & R. Co. v. Tharp, 5 Harring. (Del.) 454; Mobile & O. R. Co. v. State, 29 Ala. 573; Flint & F. Plank R. Co. v. Woodhull, 25 Mich. 99; Baltimore v. Pittsburg & C. R. Co., 1 Abbott, U. S. 9. In Miners' Bank v. United States, 1 Greene (Iowa), 553, the power of the legislature to decide finally the question of abuse is recognized. In Crease v. Babcock, 23 Pick. 334, the effect of the decision is that the legislature may determine the existence of a default where the power to determine it has been reserved. See De Camp v. Eveland, 19 Barb. 81; Vermont & C. R. Co. v. Vt. Cent. R. Co., 34 Vt. 1, 56, 57.

⁸ Thornton v. Marginal Freight R. Co., 123 Mass. 32.

question whether there has been a default or non-compliance with a condition subsequent by the corporation is a judicial question.¹ A special charter may, under the reserved power, be repealed by a general law;² but the mere repeal of a general law authorizing the formation of corporations does not affect corporations already created under it.³

A statute may provide a judicial proceeding for dissolving a corporation and winding up its affairs, on account of its abandonment of its business; and it is no defence to the proceeding that such abandonment has not been voluntary, or that a decree in bankruptcy has been passed against the corporation, or that it has received similar charters from other States, as the proceeding for winding up will affect only its franchise within the State.⁴

Modes of terminating Corporate Existence. — Corporate existence may be terminated by the surrender of the charter and its acceptance by the State;⁵ or by due proceedings under statutes authorizing a dissolution and winding up.⁶ It is not terminated by an omission to elect directors;⁷ or by a lease or sale of all the corporate property;⁸ or by insolvency;⁹ or by the appointment of a receiver;¹⁰ although an absolute and permanent inability to perform corporate duties arising from such causes would justify a

¹ *State v. Noyes*, 47 Me. 189; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. 358; *Sturges v. Vanderbilt*, 73 N. Y. 384.

² *State v. Com'r of Railroad Taxation*, 8 Vroom, 228, 9 Vroom, 472.

³ *Donworth v. Coolbaugh*, 5 Iowa, 300; *Freehold Mut. Loan Assoc. v. Brown*, 2 Stewart (N. J.), 121; *Bewick v. Alpena Harbor Co.*, 39 Mich. 700.

⁴ *Hart v. Boston, H., & E. R. Co.*, 40 Conn. 524; *Turnpike Co. v. State*, 3 Wall. 210; *Commonwealth v. Pittsburg & C. R. Co.*, 58 Pa. St. 26, 43.

⁵ *Mumma v. Potomac Co.*, 8 Peters, 281, 287; *Wilson v. Central Bridge*, 9 R. I. 590; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42; *McMahan v. Morrison*, 16 Ind. 172; *La Grange & M. R. Co. v. Rainey*, 7 Cold. 420, 437-439; *Enfield Toll Bridge Co. v. Conn. River Co.*, 7 Conn. 28, 45; *Campbell v. Miss. Union Bank*, 6 How. (Miss.) 625; *Angell & A. on Corp.* §§ 772, 773.

⁶ *Angell & A. on Corp.* ch. 22; 2 Kent

Com. 311; *Gen. Stat. Mass.* ch. 68, § 35; *English Companies' Act*, ch. 89, 1862, § 79.

⁷ *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124.

⁸ *Commonwealth v. Cent. Pass. R. Co.*, 52 Pa. St. 506; *Bruffett v. Great Western R. Co.*, 25 Ill. 353; *State v. Rives*, 5 Ired. 297, 309; *Commonwealth v. Tenth Mass. Turnp. Co.*, 5 Cush. 509; *United States v. Little Miami, C., & X. R. Co.* (U. S. C. C. S. D. Ohio, March, 1880), 9 Reporter, 676.

⁹ *Germantown Pass. R. Co. v. Fitler*, 60 Pa. St. 124, 132; *State v. Bailey*, 16 Ind. 46; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124; *Mickles v. Rochester City Bank*, 11 Paige, 118; *Bradt v. Benedict*, 17 N. Y. 93; *People v. Northern R. Co.*, 42 N. Y. 217.

¹⁰ *Willink v. Morris Canal & R. Co.*, 3 Green, Ch. 377; *State v. Railroad Com'rs*, 12 Vroom, 235; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Ahrens v. State Bank*, 3 S. C. 401.

judgment of forfeiture. It is not dissolved by a mere failure to perform the conditions subsequent on which its duration depends, and such conditions can be taken advantage of only by the State.¹ It may be dissolved by the death of all its members, or the loss of an integral part of its organization; but, in this last case, only when it has lost the capacity to restore itself.² It may be dissolved by a consolidation with another company, or a transfer of its franchises under authority of law.³ A dissolution will take effect without a judicial declaration, where the statute prescribes that it shall take effect in a certain event, as upon the expiration of a certain period,⁴ or upon a failure to begin or complete the construction of the road within a time named.⁵ If corporate existence depends on the commencement of the construction of the road within a certain time, the condition is not fulfilled by another company, as a lessee, beginning the work.⁶

Forfeiture.—The nonuser or misuser of its franchises by a corporation, or its breach of the conditions on which its duration is, by the law of its creation, made to depend, is a cause of forfeiture. Such defaults, however, do not of themselves work a forfeiture, but they take effect only when judicially determined in a direct proceeding instituted for the purpose.⁷ A nonuser or misuser is a ground of forfeiture, although not expressly declared

¹ *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. 358; *People v. Manhattan Co.*, 9 Wend. 351; *La Grange & M. R. Co. v. Rainey*, 7 Cold. 420, 432; *State v. Fagan*, 22 La. An. 545; *Haight v. New York Elevated R. Co.*, 49 How. Pr. 20; *New York Elevated R. Co., In re*, 70 N.Y. 327, 338, 3 Abbott, N. C. 306; *Angell & A. on Corp.* § 777.

² *Attorney-General v. Miss. Valley & S. I. R. Co.*, 51 Miss. 602; *Bradt v. Benedict*, 17 N. Y. 93, 98; *State v. Vincennes University*, 5 Ind. 77, 80; *Angell & A. on Corp.* §§ 768, 770.

³ *Shields v. Ohio*, 95 U. S. 319; *Bishop v. Brainerd*, 28 Conn. 289; *McMahan v. Morrison*, 16 Ind. 172. Whether the consolidation effects an extinction of the former corporation is a question of legislative intent. *Central R. & B. Co. v. Georgia*, 92 U. S. 665; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359; *post*, Chap. XVIII. p. 487.

⁴ *Sturges v. Vanderbilt*, 73 N. Y. 384, *La Grange & M. R. Co. v. Rainey*, 7 Cold. 420. See *Carey v. Cincinnati & C. R. Co.*, 5 Iowa, 357, 367.

⁵ *Brooklyn, W., & N. R. Co., In re*, 72 N. Y. 245, 75 N. Y. 335, 19 Hun, 314, 55 How. Pr. 14; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524; *Oakland R. Co. v. Oakland, B., & F. V. R. Co.*, 45 Cal. 365.

⁶ *Brooklyn, W., & N. R. Co., In re*, 19 Hun, 314, 72 N. Y. 245, 75 N. Y. 335.

⁷ *State v. Noyes*, 47 Me. 189; *Enfield Toll Bridge Co. v. Conn. River Co.*, 7 Conn. 28, 46; *People v. Manhattan Co.*, 9 Wend. 351; *People v. Hillsdale & C. Turnp. Co.*, 23 Wend. 254; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. 358; *Ormsby v. Vt. Copper M. Co.*, 65 Barb. 360; *Sturges v. Vanderbilt*, 73 N. Y. 384; *People v. Waterford & S. Turnp. Co.*, 3 Abbott Ct. App. 580; *Vermont & C. R. Co. v. Vt. Cent. R. Co.*, 34 Vt. 1, 56; *Peo-*

to be such by statute.¹ A mere intention to violate corporate duty, or the obtaining of a charter from another State, is not a cause of forfeiture;² and generally such cause must be a wilful abuse or culpable neglect, and not a mere omission or non-feasance.³ The court, when a cause of forfeiture is shown, has no discretion to refuse a judgment upon the ground that the forfeiture is against the public interest.⁴

A cause of forfeiture which has not been judicially declared in a direct proceeding cannot be taken advantage of collaterally.⁵ The State alone having the right to insist on a forfeiture can waive it, directly or by implication.⁶ The waiver will not, however, revive a corporation which by its default has ceased to exist, where the legislature is prohibited by the constitution from granting special charters.⁷

Quo Warranto and Scire Facias.—The proceeding against a corporation for usurpation, nonuser, or misuser of a franchise is

ple *v. River Raisin & L. E. R. Co.*, 12 Mich. 389; *Baltimore & O. R. Co. v. Supervisors*, 3 W. Va. 319; *La Grange & M. R. Co. v. Rainey*, 7 Cold. 420; *Ahrens v. State Bank*, 3 S. C. 401; *Shand v. Gage*, 9 S. C. 187; *Chesapeake & O. Canal Co. v. Balt. & O. R. Co.*, 4 Gill & J. 1, 106, 107.

¹ *Commonwealth v. Commercial Bank*, 28 Pa. St. 383; *Attorney-General v. Petersburg & R. R. Co.*, 6 Ired. 456; *State v. Mil. L. S., & W. R. Co.*, 45 Wis. 579.

² *Commonwealth v. Pittsburg & C. R. Co.*, 58 Pa. St. 26.

³ *Attorney-General v. Miss. Valley & S. I. R. Co.*, 51 Miss. 602; *Commonwealth v. Commercial Bank*, 28 Pa. St. 383; *Angell & A. on Corp.* § 776.

⁴ *State v. Penn. & O. Canal Co.*, 23 Ohio St. 121.

⁵ *Chesapeake & O. C. Co. v. Balt. & O. R. Co.*, 4 Gill & J. 1, 121; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124; *Hamilton v. Annapolis & E. R. Co.*, 1 Md. Ch. 107; *Laffin & R. P. Co. v. Sinsheimer*, 46 Md. 315; *Frost v. Frostburg Coal Co.*, 24 How. 278; *Chubb v. Upton*, 95 U. S. 665; *New Jersey Southern R. Co. v. Long Branch Com'rs*, 10 Vroom, 28; *Commonwealth v. Allegheny Bridge Co.*, 20 Pa. St. 185; *Dyer v. Walker*, 40 Pa. St. 157; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325; *Farn-*

ham v. Del. & H. C. Co., 61 Pa. St. 265, 271; *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch. 625; *New York Elevated R. Co., In re*, 70 N.Y. 327; *Conn. & P. R. R. Co. v. Bailey*, 24 Vt. 465; *Wilmington & M. R. Co. v. Saunders*, 3 Jones (N. C.), 126; *Lehman v. Warner*, 61 Ala. 455; *State v. Fagan*, 22 La. An. 545; *Union Branch R. Co. v. East Tenn. & G. R. Co.*, 14 Ga. 327; *Ahrens v. State Bank*, 3 S. C. 401, 407; *Bohannon v. Binns*, 31 Miss. 355; *La Grange & M. R. Co. v. Rainey*, 7 Cold. 420; *Angell & A. on Corp.* § 777; 2 Kent Com. 312.

⁶ *People v. Manhattan Co.*, 9 Wend. 351; *New York Elevated R. Co., In re*, 70 N.Y. 327; *People v. Miss. & A. R. Co.*, 14 Ill. 440; *Commonwealth v. Pittsburg & C. R. Co.*, 58 Pa. St. 26, 49; *Farnham v. Del. & H. C. Co.*, 61 Pa. St. 265; *Attorney-General v. Petersburg & R. R. Co.*, 6 Ired. 456; *State v. Miss., O., & R. R. R. Co.*, 20 Ark. 495; *La Grange & M. R. Co. v. Rainey*, 7 Cold. 420; *Commonwealth v. Tenth Mass. Turnp. Co.*, 11 Cush. 171; *State v. Fourth N. H. Turnp.*, 15 N. H. 162.

⁷ *Brooklyn, W., & N. R. Co., In re*, 75 N. Y. 335, 72 N. Y. 245, 19 Hun, 814, 55 How. Pr. 14; *People v. Manhattan Co.*, 9 Wend. 351; *Oroville & V. R. Co. v. Plumas County*, 37 Cal. 354.

by *scire facias*, or an information in the nature of a *quo warranto*, each prosecuted at the instance and on behalf of the State. The former can be used only against a corporation, legally existing and capable of acting, which has abused its power, while the latter is available both against a legally existing corporation guilty of such abuse and against individuals unlawfully assuming to be a corporation.¹ When the proceeding is for ousting parties claiming to be a corporation without warrant of law, it must be against individuals; for if against the corporation, the information admits its present or former existence.² When it is for excluding a corporation from franchises which it has usurped, it may be filed against the corporation, and the judgment will be of ouster from such franchises, but not of dissolution.³

The granting of leave to file the information is within the discretion of the court.⁴ The attorney-general or proper prosecuting officer may institute the suit without a special authority or direction from the legislature.⁵ A statute penalty for a default, or a reserved power of repeal, does not exclude these remedies.⁶ Damages are not awarded on a judgment on *quo warranto*.⁷

Corporate Property in the Event of a Dissolution.—The capital of a corporation becomes, upon its dissolution, a fund to be administered in equity for the payment of creditors, and afterwards for distribution among stockholders.⁸ The creditors

¹ *Chesapeake & O. C. Co. v. Baltimore & O. R. Co.*, 4 Gill & J. 1, 121; *Washington & B. Turnp. Co. v. Maryland*, 19 Md. 239, 287; *People v. Rensselaer & S. R. Co.*, 15 Wend. 113; *People v. Bristol & R. Turnp. Co.*, 23 Wend. 222, 235; *People v. Northern R. Co.*, 42 N. Y. 217; *State v. Mil. L. S. & W. R. Co.*, 45 Wis. 579; *Commonwealth v. Tenth Mass. Turnp. Co.*, 5 Cush. 509; *State v. Boston, C., & M. R. Co.*, 25 Vt. 433; *People v. Jackson & M. P. R. Co.*, 9 Mich. 285; *Bruffett v. Great Western R. Co.*, 25 Ill. 353; *State v. Consolidation Coal Co.*, 46 Md. 1; *National Docks R. Co. v. Central R. Co.*, 5 Stewart (N. J.), 755, 4 Stewart (N. J.), 475; *Angell & A. on Corp.* ch. 21, 22; 2 Kent Com. 313; *Grant on Corp.* 295-305.

² *People v. Rensselaer & S. R. Co.*, 15 Wend. 113; *State v. Cincinnati Gas Light & C. Co.*, 18 Ohio St. 262; *Mud Creek Draining Co. v. State*, 43 Ind. 236.

³ *State v. Penn. & O. Canal Co.*, 23 Ohio St. 121; *People v. Rensselaer & S. R. Co.*, 15 Wend. 113.

⁴ *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen, 221, 224; *Cole v. Dyer*, 29 Ga. 434.

⁵ *State v. Southern Pacific R. Co.*, 24 Tex. 80.

⁶ *People v. Bristol & R. Turnp. Co.*, 23 Wend. 222, 244; *Washington & B. Turnp. Co. v. Maryland*, 19 Md. 239, 287; *State v. Southern Pacific R. Co.*, 24 Tex. 80.

⁷ *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen, 221, 225.

⁸ *Mumma v. Potomac Co.*, 8 Peters, 281; *Curran v. Arkansas*, 15 How. 304; *Bacon v. Robertson*, 18 How. 480; *Lum v. Robertson*, 6 Wall. 277; *Hightower v. Thornton*, 8 Ga. 486; *Montgomery & W. P. R. Co. v. Branch*, 59 Ala. 139; *Shamokin Valley & P. R. Co. v. Malone*, 85 Pa. St. 25; *Western North Carolina R.*

have a lien on the assets, and may follow them into the hands of stockholders and persons who are indebted to the corporation.¹ The rights of stockholders in the assets are subordinate to those of creditors.²

Domicile of the Corporation. — The home or domicile of a corporation is within the State which created it. It exists only by force of law, and cannot live beyond the jurisdiction of that law. But it may, by the comity of States, perform acts elsewhere. Thus, when authorized by the law which created it, it may make contracts, own property real or personal, and sue in other States, when admitted to do so by their law or policy,³ and the permission to do this is implied unless a refusal is expressed in some affirmative way.⁴ The corporation may own and operate railroads in a foreign State under due authority of its statutes.⁵ A State may, however, at will license or refuse to license foreign corporations to act within its jurisdiction.⁶ The particular domicile of a corporation within a State depends upon the language of its statutes.⁷

The purely local existence of a corporation has been held to exempt it from liability to be sued in other States, although having a place of business and carrying on business in them, except by means of an attachment of its property, or under an express statute provision;⁸ but some authorities maintain, with good rea-

Co. v. Rollins, 82 N. C. 523; Lothrop v. Stedman, 42 Conn. 583, 13 Blatch. 184.

¹ Bartlett v. Drew, 57 N. Y. 587; Hastings v. Drew, 76 N. Y. 9; Hardy v. Merriweather, 14 Ind. 203; Bish v. Bradford, 17 Ind. 490; Bacon v. Robertson, 18 How. 480; Germantown Pass. R. Co. v. Fitler, 60 Pa. St. 124; Henry v. Vermilion & A. R. Co., 17 Ohio, 187; Robertson v. Sibley, 10 Minn. 323.

² Ryan v. Leavenworth, A., & N. W. Co., 21 Kan. 365.

³ Bank of Augusta v. Earle, 13 Peters, 519, 588; Christian Union v. Yount, 101 U. S. 352; Black v. Del. & R. Canal Co., 7 C. E. Green, 130, 422, 9 C. E. Green, 455; Baltimore & O. R. Co. v. Glenn, 28 Md. 287; O'Brien v. Wetherell, 14 Kan. 616; State v. Boston, C., & M. R. Co., 25 Vt. 433; Claremont Bridge v. Royce, 42 Vt. 730; Thompson v. Waters, 25 Mich. 214; Merrick v.

Van Santvoord, 34 N. Y. 208, 38 Barb. 574; Bank of Ashland v. Jones, 16 Ohio St. 145, 157.

⁴ Cowell v. Colorado Springs Co., 100 U. S. 55, 3 Col. 82.

⁵ Baltimore & O. R. Co. v. Harris, 12 Wall 65; Martin v. Mobile & O. R. Co., 7 Bush, 116; Hunt v. Kansas & M. Bridge Co., 11 Kan. 412; *post*, Chap. XIX. p. 497.

⁶ Doyle v. Continental Ins. Co., 94 U. S. 535.

⁷ Bristol v. Chicago & A. R. Co., 15 Ill. 436.

⁸ Andrews v. Mich. Cent. R. Co., 99 Mass. 534; Williston v. Mich. S. & N. I. R. Co., 13 Allen, 400; Smith v. Mut. Life Ins. Co., 14 Allen, 336; Blackstone Man. Co. v. Blackstone, 13 Gray, 488; Brewster v. Mich. Cent. R. Co., 5 How. Pr. 183; Barnett v. Chicago & L. H. R. Co., 6 Thomp. & C. 358, 4 Hun, 114; Ogdensburg & L. C. R. Co. v. Vt. & C. R. Co., 6 Thomp. & C. 488, 489, *note*.

son, its liability to be sued within a foreign jurisdiction, where it has a place of business, upon causes of action arising therein.¹ A corporation, by leasing a road in a foreign State and operating it as owner, becomes the citizen of such State for the purpose of jurisdiction, and a suit against it therein is not subject to removal to the national tribunals.² A corporation created by the legislation of different States may be sued as a domestic corporation in each.³ Suits and proceedings which relate to the internal economy of a corporation, such as for enforcing the peculiar rights and liabilities of members,⁴ or determining who are the rightful officers, or compelling the directors to declare and pay dividends or perform other duties,⁵ or declaring a forfeiture of the franchises,⁶ or dissolving the corporation and winding up its affairs, can be brought only in the domestic jurisdiction.

A mandamus will not be issued to enforce a municipal subscription to a foreign corporation.⁷

A court of equity will not compel a domestic corporation to perform acts in a foreign State from which it has received a charter,⁸ but it will, under some circumstances, take jurisdiction as to property in another State, where the person against whom relief is sought is within the State.⁹

A court having jurisdiction of the subject-matter will obtain jurisdiction of a foreign corporation by its consent, which may be expressed by an appearance by attorney, and answering generally to the action.¹⁰

The deed of a corporation executed in the State creating it, and valid by its laws, will be held valid in other States.¹¹

¹ *Newby v. Von Oppen*, L. R. 7 Q. B. 293; *National Condensed Milk Co. v. Brandenburg*, 11 Vroom, 111; *Cumberland Coal Co. v. Sherman*, 8 Abbott Pr. 243; *Cumberland Coal & I. Co. v. Hoffman Coal Co.*, 30 Barb. 159.

² *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 481; *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394.

³ *Mahany v. Kephart*, 15 W. Va. 609; *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. 655.

⁴ *Erickson v. Nesmith*, 4 Allen, 233; *Halsey v. McLean*, 12 Allen, 438. *Contra*, *Flash v. Conn*, 16 Fla. 428.

⁵ *Williston v. Mich. S. & N. I. R. Co.*, 13 Allen, 400, *Howell v. Chicago & N. W. R. Co.*, 51 Barb. 378; *Chase v. Van-*

derbilt, 37 N. Y. Superior, 334, 62 N. Y. 307. But see *Prouty v. Mich. S. & N. I. R. Co.*, 4 Thomp. & C. 230, 1 Hun, 655; *Redmond v. Hoge*, 3 Hun, 171, 13 Abbott Pr. n. s. 332.

⁶ *Carey v. Cincinnati & C. R. Co.*, 5 Iowa, 357.

⁷ *Land Grant R. T. Co. v. Coffey County*, 6 Kan. 245.

⁸ *Port Royal R. Co. v. Hammond*, 58 Ga. 523.

⁹ *Mead v. New York H. & N. R. Co.*, 45 Conn. 199.

¹⁰ *McCormick v. Penn. Cent. R. Co.*, 49 N. Y. 208.

¹¹ *Baltimore & O. R. Co. v. Glenn*, 23 Md. 287.

A corporation is, for the purposes of the jurisdiction of the courts of the United States, a citizen of the State creating it,¹ and an affidavit in its behalf, for the purpose of removing an action from a State to a national court, may be sworn to by an officer duly authorized to act for it.²

The Status of a Railroad Corporation Established in Different States. — The status of a corporation, owning a railroad which extends into different States, presents difficulties growing out of its relation to distinct sovereignties with their legislative and judicial systems more or less conflicting or divergent. A reference to the principles of international law, public and private, may help to define it.

A state or nation has exclusive sovereignty or jurisdiction within its limits. This fundamental doctrine includes all matters relating to property or persons, — as the title to real and personal property, and the conditions of its use and transfer; the validity of contracts; the civil condition, rights, and obligations of persons, artificial bodies or institutions, public and private; the remedial system; police regulations; in short, everything to which the functions of government pertain. It necessarily follows that within its limits no other State can, by its laws, govern or regulate in any of these respects. Foreign laws may take effect in a State to a greater or less degree, but this is by virtue of its express or tacit consent under the comity which prevails between States; and this consent may be given or withheld in its discretion. A foreign corporation may act within it by its permission, and this permission may be given upon such terms as it may see fit to impose.³ These principles define the relation between the States of this Union as well as the relation between independent nations.

It results from these principles that one State cannot, without the express or implied consent of another State, confer powers upon a corporation created by itself to be exercised in that other

¹ Louisville, C., & C. R. Co. v. Letson, 2 How. 497; Ohio & M. R. Co. v. Wheeler, 1 Black, 286; Boom Co. v. Patterson, 98 U. S. 403; Quigley v. Cent. Pacific R. Co., 11 Nev. 350, 357. As to the effect of its association with a domestic corporation, see

Chicago & N. W. R. Co. v. Chicago & P. R. Co., 6 Biss. 219.

² Mahone v. Manchester & L. R. Co., 111 Mass. 72; Quigley v. Cent. Pacific R. Co., 11 Nev. 350.

³ Wheaton's International Law, §§ 77, 79; Wharton's Confl. Laws, ch. 7.

State, as to hold real or personal property, to buy or condemn land for a railroad, or use it for profit, or to pursue remedies in the courts of such State. But with the consent of such State, express or implied, it may authorize the corporation to do any of these acts. These privileges differ in degree, but not in kind, from the commercial powers generally allowed to foreign corporations. The power of a foreign corporation to exercise some of these functions in a State may be implied from its general policy, while others, as that of eminent domain, can only be derived from an express statute.

There is, then, no principle of public law which prohibits a State from authorizing a foreign corporation to extend a railroad into its own territory, and for that purpose to buy or take land, and, after its construction, to maintain and operate it. The corporation still remains one corporation, a domestic corporation in the State which created it, and a foreign corporation in the other, enjoying the franchises conferred by its charter in the one, and the powers derived from the enabling act in the other. There certainly is no reason for treating it as two corporations severed by the boundary line of the two States.

The question is not so simple where two States by common legislation create the same corporation. In this case it is not merely the creature of one State with enlarged powers derived from the other, but it is as much the creature of one State as of the other. If, however, the intent of the legislation of both was to make one corporation only, there is no legal or constitutional necessity for treating it as two corporations in any suits or proceedings by or against it. The theory of two corporations existing in one thus created is a mere conception of the mind, and does not rest upon any legislative intent or the actual state of things. It fails likewise to be of practical use in determining the respective rights of the corporation and of the public, and in adjusting to them the proper remedies. The corporation in each State has a common stock, the same shareholders, and the same property, thus answering the essential conditions of unity, and there are no analogies for treating it as a duality.

The unity of the corporation is consistent with its being subject to different laws in the different jurisdictions. In this respect it does not differ from insurance or other corporations, which may have certain powers in the State creating them and have less or

greater powers in other States in which, by comity, they are permitted to act. The railroad and franchise may be held by a different tenure in each State, with greater capacity for alienation, and greater liability to forfeiture in one than in the other. They may be capable of mortgage or sale, or be subject to execution in one State and not in the other, so that the ownership of the road may become severed, — the corporation still owning the part lying in one State and ceasing by voluntary or involuntary alienation to own the part lying in the other. Legislative and judicial proceedings may terminate its capacity to act in one State, while its capacity to act in another remains. These propositions are but illustrations of the exclusive sovereignty or jurisdiction of a State within its own limits. Still further, upon the fundamental principle which places real and personal property under the local laws of its site, a State may, for the purpose of protecting its own citizens, cause the property of either kind belonging to a foreigner or foreign corporation found within its limits to be applied to the payment of domestic creditors as against an assignment in bankruptcy made in the State of his domicile; ¹ but this power of a State may, as between the States of this Union, be controlled by the operation of a national bankrupt act.

It may be remarked that, owing to the peculiar character of railroad corporations as regards the nature of their property, their franchises, and public duties, when owning and operating a road lying in different States, the co-operating legislative and judicial action of such States is necessary to prevent great embarrassment and complication as to the rights of stockholders and creditors; but this circumstance does not make a corporation a duality, which the power or powers creating it by fair construction intended to have exist and act as a unity.

The suggestion is ventured that the figurative language of Chief Justice Taney, often quoted, has not been of practical use in determining the status of a corporation established by or receiving powers from different States.² While properly descriptive

¹ Wharton's Conf. Laws, §§ 386-392, 840-852; Story's Conf. Laws, §§ 390-410; 2 Kent Com. 406-408; Wheaton's International Law, § 88; *Guillander v. Howell*, 35 N. Y. 657.

² "A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It

exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." *Bank of Augusta v. Earle*, 13 Pet. 519, 588. Taney, C. J.

of the local character and capacity of a corporation in the absence of express or implied authority from other States, it gives little aid in determining the status of a corporation which has received such additional authority.

The doctrine that there are necessarily two corporations where the legislatures of two States, by co-operating acts, authorize the same persons or body with the same name, powers, liabilities, and an identity of capital stock, to construct and maintain a railroad in the two States, has found some support;¹ but according to the better view, the question whether there is a unity in the corporation and in the proprietorship of the road is always one of legislative intent, and not of legislative power or legal possibility. Several States may, by competent legislation, unite in creating the same corporation or in combining several pre-existing corporations into a single one. One State may make a corporation of another State, as there organized and conducted, a corporation of its own as to any property within its territorial jurisdiction.² A State may, by an enabling act, authorize a corporation created in another State to build and operate a railroad within its limits without creating a new corporation. Thus, where the State of Maryland incorporated the Baltimore and Ohio Railroad Company to construct a railroad from the city of Baltimore to the Ohio River, in the States of Maryland and Virginia, and subsequently the State of Virginia granted to the company within its territory the same rights and privileges, and subjected it to the same obligations as had been granted and imposed by the State of Maryland in the act referred to, it was held that after such enabling act it remained one and the same corporation in name, locality, capital stock, and management, with only extended powers and an enlarged sphere of operations, being still a Maryland corporation with a license in Virginia of a broad and comprehensive character. The company, being further authorized by Congress to extend a branch into the District of Columbia, still remained a Maryland corporation, with a license to build and operate a railroad in the national territory. It was, therefore,

¹ *Ohio & M. R. Co. v. Wheeler*, 1 Black, 286; *Racine & M. R. Co. v. Farmers' Loan & T. Co.*, 49 Ill. 331. See *Cram v. Farmers' Loan & T. Co.*, 5 Rob. (N. Y.) 226.

² *Baltimore & O. R. Co. v. Gallahue*,

12 Gratt. 655; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431; *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394; *Goshorn v. Ohio County*, 1 W. Va. 308; *Indianapolis & St. L. R. Co. v. Vance*, 96 U. S. 450.

held in a suit against the corporation, brought in the District of Columbia, for an injury, upon a part of the road lying in Virginia, to a passenger who had bought a ticket in the District for a passage from the city of Washington over the road through Maryland and Virginia to a place in Ohio, that the corporation created by the State of Maryland was the same in the different jurisdictions, and was liable to a suit in the District of Columbia, where it was permitted to exercise its authority upon the implied condition of consenting to be sued there for an injury occurring upon the part of the road lying outside of the District.¹

But a permission to a foreign corporation to hold property and manage a railroad within the State does not of itself make it a domestic corporation.² A corporation created by different States is one corporation in both States. A mortgage made by a corporation created by different States, with a road lying partly in each, and conveying its entire road, is treated as one mortgage. Thus, where a company owning a railroad lying in two different States, under charters from each, mortgages the whole road and franchise, and its right to redeem in one State is sold on execution, the purchaser of the equity will be allowed, in that State, to redeem the whole road from the mortgage.³

A corporation created by the legislation of two States, and owning a line of road extending from a place in one State to a place in the other, was treated as one corporation in determining the limits of the taxing power of a State. Bonds having been issued by the corporation, secured by a mortgage of the entire road, it was held that a tax upon the bonds by one of the States would be a tax upon property and interests beyond its jurisdiction, and therefore beyond its powers.⁴

Such a corporation is held to have a legal domicile in each

¹ *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270; *Wheeling v. Baltimore*, 1 Hughes, 90; *Pomeroy v. New York & N. H. R. Co.*, 4 Blatch. 120; *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. 219; *St. Louis A. & T. H. R. Co. v. Indianapolis & St. L. R. Co.* (U. S. C. C. Ind., October, 1879), 12 Chicago Leg. News, 73, 9 Reporter, 103; *Bishop v. Brainard*, 28 Conn. 289, 299.

² *Baltimore & O. R. Co. v. Cary*, 28 Ohio St. 208; *Erie R. Co. v. Stringer*, 32

Ohio St. 468; *State v. Del., L., & W. R. Co.*, 1 Vroom, 473, 2 Vroom, 581; *Dennistown v. New York & N. H. R. Co.*, 1 Hilton, 62. See *Phillipsburgh Bank v. Lackawanna R. Co.*, 3 Dutch. 206; *Sprague v. Hartford, P., & F. R. Co.*, 5 R. I. 233.

³ *Wood v. Goodwin*, 49 Me. 260. See *Racine & M. R. Co. v. Farmers' Loan & T. Co.*, 49 Ill. 331.

⁴ *Northern Cent. R. Co. v. Jackson*, 7 Wall. 262. But see *Maltby v. Reading & C. R. Co.*, 52 Pa. St. 140.

State, and may hold meetings and transact corporate business in each.¹

A tax upon the income and property of a corporation owning a railroad which runs through different States is properly apportioned by taking the whole income or value of the franchise, and the length of the road in each State, as the basis of taxation.²

The question, whether a corporation created in two States, and operating a railroad in them, is to be considered as one or two corporations, has been raised in proceedings in bankruptcy. It was held that whether it was one corporation, or two corporations chartered by different States, with a common interest, common property, common stock, and one set of creditors; or whether it was an anomalous body, not precisely answering either of these descriptions, whatever its character in these respects, — the District Court of the United States within each State in which the corporation is thus established has jurisdiction in bankruptcy against it, and the court for the district in which the petition is first filed acquires exclusive jurisdiction.³

A railroad corporation, created and exercising its franchises, and having its property in different States, may be restrained in one from using its corporate funds for other than corporate purposes in both States.⁴ Such a corporation remains a domestic corporation in each State, although established in another.⁵ It does not, by obtaining a charter from another State, relieve itself from its obligations or change its relation to the State which created it.⁶

Charters granted in similar terms by two States to a railroad company have been said to create a compact between them, to be construed liberally with reference to its objects, and not according to the local usages of either.⁷ This statement, however, refers only to the spirit with which such a charter granted by

¹ Covington & C. Bridge Co. v. Mayer, 31 Ohio St. 317.

² Delaware Railroad Tax Case, 18 Wall. 206; Erie R. Co. v. Pennsylvania, 21 Wall. 492; State Railroad Tax Cases, 92 U. S. 575, 611. See *post*, Chap. XVIII. p. 473.

³ Boston, H., & E. R. Co., *In re*, 9 Blatch. 101, 409

⁴ State v. Northern Cent. R. Co., 18 Md. 193, 215; Baltimore & O. R. Co. v.

Glenn, 28 Md. 287, 320; March v. Eastern R. Co., 40 N. H. 548, 577; Fisk v. Chicago, R. I., & P. R. Co., 4 Abbott Pr. x. s. 378.

⁵ Sprague v. Hartford, P., & F. R. Co., 5 R. I. 233.

⁶ Commonwealth v. Pittsburg & C. R. Co., 58 Pa. St. 26.

⁷ Brockett v. Ohio & P. R. Co., 14 Pa. St. 241, 244; Cleveland & P. R. Co. v. Speer, 56 Pa. St. 325.

different States to the same corporation is to be construed. It cannot be understood literally, as the Constitution of the United States forbids a State, without the consent of Congress, to enter into any agreement or compact with another State.¹ The effect of such concurrent legislation is not to make the body a corporation of two States, created by their joint act, but to make the same body a corporation of each State.²

A grant of authority to a foreign corporation, to exercise its franchises and hold property in a State, does not confer jurisdiction on the courts of the foreign State as to such property. Thus, where two corporations of different States are consolidated under lawful authority, one of which was subject in one State to a mortgage prior to such consolidation, the courts of the other State do not thereby acquire jurisdiction so as to enforce a foreclosure of the mortgage.³

Where a railroad, lying partly in one State and partly in another, is subject to a mortgage, the courts of one State, having jurisdiction of the mortgagor and trustees under the mortgage, may order the sale of the road as an entirety; but such sale would be subject to liens existing in the other State.⁴

A consolidated railroad corporation, formed by the union of two corporations, each created by a different State, is, so far as property and business within each State are concerned, subject, unless otherwise provided in the act of consolidation, to the same control therein as before,⁵ and in each State is to be treated as a domestic corporation.⁶ It is, as to property within each State, subject, in the appointment of receivers and otherwise, to the jurisdiction of its courts.⁷ The Circuit Court of the United States, for a district in one State, has been held to have jurisdiction to

¹ Art. I. § 10. See *Union Branch R. Co. v. East Tenn. & G. R. Co.*, 14 Ga. 327; *Covington v. Covington & C. Bridge Co.*, 10 Bush, 69, 79.

² *Quincy Bridge Co. v. Adams County*, 88 Ill. 615; *McGregor v. Erie R. Co.*, 6 Vroom, 115; *State v. Metz*, 3 Vroom, 199; *Sprague v. Hartford, P., & F. R. Co.*, 5 R. I. 233; *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. 219.

³ *Eaton & H. R. Co. v. Hunt*, 20 Ind. 457.

⁴ *McElrath v. Pittsburg & S. R. Co.*, 55 Pa. St. 189, *Muller v. Dows*, 94 U. S.

444; *Hand v. Savannah & C. R. Co.*, 12 S. C. 314, 366; *Mead v. New York, H., & N. R. Co.*, 45 Conn. 199.

⁵ *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164.

⁶ *Sage, In re*, 70 N. Y. 220; *Muller v. Dows*, 94 U. S. 444.

⁷ *United States Rolling-Stock Co. In re*, 57 How. Pr. 16, 55 How. Pr. 286; *Taylor v. Atlantic & G. W. R. Co.*, 57 How. Pr. 9, 55 How. Pr. 275; *Ellis v. Boston, H., & E. R. Co.*, 107 Mass. 1; *Richardson v. Vt. & M. R. Co.*, 44 Vt. 613.

appoint a receiver for an entire line, whether lying within or without the State.¹

A corporation which has received similar charters from different States may be dissolved and wound up in each one without its franchise in the other States being affected.² Its charter may be amended in one State, so as to control its action and property therein, although the amendment may be contrary to some statutory or constitutional provision of another State which has granted it a charter.³

¹ *Wilmer v. Atlanta & R. A. L. R. Co.*,
2 Woods, 409.

² *Hart v. Boston, H., & E. R. Co.*, 40
Conn. 524.

³ *Covington v. Covington & C. Bridge
R. Co.*, 10 Bush, 69.

CHAPTER II.

THE DIRECTION OF THE CORPORATION.

THE affairs of commercial or business corporations are conducted by a board of official managers, usually called directors. As the corporation is only a legal existence and not a living personality, the directors become, in a practical sense, the corporation itself, so far, at least, as its relations to the public are concerned.¹ The right to elect such officers is inherent in the body; but their number and the mode of their election are usually prescribed by statute.² In the case of corporations organized under a general law, a provisional board of directors with limited powers is usually to be named in the articles of association.³

Qualifications of Directors and Voters.—The qualifications of directors, unless prescribed by statute, may be determined by the corporation. The director need not be a stockholder where the statute or by-laws are silent as to such a requirement.⁴ If he is required to be such, he may qualify between his election and acceptance;⁵ and if he appears by the books to be an owner of stock, he is eligible for the office, although the beneficial interest is in another.⁶

The books of the corporation, containing the names of the stockholders, determine who are entitled to vote at its meetings.⁷ The right to vote depends on the record title, and not on the actual ownership.⁸ The corporation may, by by-laws, regulate the voting upon stock except as provided by

¹ Perkins v. New York Cent. R. Co., 24 N. Y. 196, 218; Steinweg v. Erie R. Co., 43 id. 128, 126; Burrill v. Nahant Bank, 2 Met. 163. Legally the directors are distinct from the corporation. Ellis v. Boston, H., & E. R. Co., 107 Mass. 1, 13.

² Hughes v. Parker, 20 N. H. 58; Brewster v. Hartley, 37 Cal. 15; 2 Kent Com. 293-295.

³ Allman v. Havana R. & E. R. Co., 88 Ill. 521.

⁴ Wight v. Springfield & N. L. R. Co.,

117 Mass. 226; State v. McDaniel, 22 Ohio St. 354; Despatch Line of Packets v. Bellamy Man. Co., 12 N. H. 205.

⁵ Karuth's Case, L. R. 20 Eq. Cas. 506. See Jenner's Case, L. R. 7 Ch. Div. 132.

⁶ State v. Ferris, 42 Conn. 560.

⁷ State v. Ferris, 42 Conn. 560; Hoppin v. Buffum, 9 R. I. 513; Long Island R. Co., *In re*, 19 Wend. 37; Downing v. Potts, 3 Zab. 66.

⁸ Mousseaux v. Urquhart, 19 La. An. 482.

statute.¹ The right to vote by proxy is not a general right, but exists only under special authority of law.² A non-resident may be a corporator.³ Ordinarily, the general and legal owner of stock holds the right to vote upon it. Thus the right belongs to the pledgor unless he makes a transfer on the books to the pledgee;⁴ to the vendor until the assignment is recorded on the books;⁵ to the trustee who appears by them to be the legal owner;⁶ to the duly qualified administrator;⁷ and to a bankrupt voting with his assignee's consent.⁸

The right to vote on shares of the capital stock is suspended while they are held by the corporation itself, whether standing on the books in its own name or that of a trustee or pledgee; for otherwise the directors might, by means of such votes, perpetuate themselves in office.⁹ Stock so held by the corporation may be sold, where the legal effect of its ownership has not extinguished or merged it; and the right of purchasers to vote is not affected by the motive of the officers in selling the same to their favorites.¹⁰ The directors, however, may be restrained, it has been considered, from using the power to sell such stock where their purpose was thereby to control an election.¹¹

Elections.—The corporation may, in the absence of statute provisions, regulate by by-laws the mode of electing directors.¹² Where statute provisions concerning elections are construed to be

¹ *Chandler v. Northern Cross R. Co.*, 18 Ill. 190; *Brewster v. Hartley*, 37 Cal. 15.

² *Phillips v. Wickham*, 1 Paige, 590, 598; *People v. Twaddell*, 18 Hun, 427; *Taylor v. Griswold*, 2 Green (N. J.), 222; *Craig v. First Presbyterian Church*, 88 Pa. St. 42; 2 Kent Com. 294, 295; *Angell & A. on Corp.* §§ 128-130.

³ *Central R. Co. v. Penn. R. Co.*, 4 Stewart (N. J.), 475, 5 Stewart (N. J.), 755.

⁴ *Brewster v. Hartley*, 37 Cal. 15; *McDaniels v. Flower Brook M. Co.*, 22 Vt. 274; *Hoppin v. Buffum*, 9 R. I. 513; *Willcocks's Case*, 7 Cowen, 402, 411; *Barker's Case*, 6 Wend. 509; *Angell & A. on Corp.* §§ 131, 132.

⁵ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 825, 331, 332.

⁶ *Hoppin v. Buffum*, 9 R. I. 513; *Wilson v. Central Bridge*, 9 R. I. 590; *Mohawk v. Hudson R. Co.*, 19 Wend. 135.

⁷ *North Shore Staten Island Ferry Co.*, *In re*, 63 Barb. 556.

⁸ *State v. Ferris*, 42 Conn. 560.

⁹ *Holmes's Case*, 5 Cowen, 426; *Willcocks's Case*, 7 Cowen, 402; *Vail v. Hamilton*, 20 Hun, 355, 359; *American Railway-Frog Co. v. Haven*, 101 Mass. 398; *State v. Smith*, 48 Vt. 266; *Brewster v. Hartley*, 37 Cal. 15; *Mousseaux v. Urquhart*, 19 La. An. 482. As to the right of contribution between directors who buy shares for a corporation under an *ultra vires* resolution, see *Ashhurst v. Mason*, L. R. 20 Eq. Cas. 225.

¹⁰ *State v. Smith*, 48 Vt. 266; *Hartbridge v. Rockwell*, R. M. Charlton (Ga.), 260; *Williams v. Savage Man. Co.*, 3 Md. Ch. 418; *City Bank v. Bruce*, 17 N. Y. 507.

¹¹ *Fraser v. Whalley*, 2 Hem. & M. 10. See *State v. Smith*, 48 Vt. 266.

¹² *Brewster v. Hartley*, 37 Cal. 15; *Long Island R. Co.*, *In re*, 19 Wend. 37.

directory only, they do not avoid elections in which they were not observed.¹ Thus a provision which requires an election to be held at a particular time, as at the annual meeting, is treated as of this character, so that an election at another time, though irregular, does not affect the title of the directors so far as their general relations to the public are concerned.² An election is legal, although in an emergency there was a departure from ordinary modes of procedure.³ An acceptance of the office is essential, but the acceptance need not be express.⁴ An election may be declared void for the rejection of legal and the counting of illegal votes, which changed the result; and for substantial irregularities, surprise, and fraud.⁵

Notice of Meetings.—Meetings of stockholders, in order to be valid, must be notified in the manner prescribed by the statute.⁶ The election of directors at a meeting not notified in the manner prescribed, cannot be questioned collaterally.⁷

Officers de Facto.—The title and acts of officers *de facto* cannot be questioned collaterally in a suit at law or in equity; and their acts bind the corporation in the same manner as if they held their offices *de jure*.⁸ Directors holding over after the expiration of their terms, to whom no successors have been chosen, are officers *de facto*, unless, by statute, their places become vacant on the expiration of their terms.⁹ In proceedings to

¹ Downing v. Potts, 3 Zab. 66; 2 Kent Com. 295.

² Hughes v. Parker, 20 N. H. 58; Nashua Fire Ins. Co. v. Moore, 55 N. H. 48; Angell & A. on Corp. §§ 286, 287.

³ Wheeler's Case, 2 Abbott Pr. n. s. 361.

⁴ Lockwood v. Mechanics' National Bank, 9 R. I. 308, 341.

⁵ Long Island R. Co., *In re*, 19 Wend. 37; People v. Albany & S. R. Co., 1 Lans. 308, 55 Barb. 344; Johnston v. Jones, 8 C. E. Green, 216. Whether a director may vote for himself for president, see Hedges v. Paquett, 3 Oreg. 77.

⁶ Shelby R. Co. v. Louisville, C., & L. R. Co., 12 Bush, 62.

⁷ Chamberlain v. Painesville & H. R. Co., 15 Ohio St. 225.

⁸ People v. Hills, 1 Lans. 202; Mechanics' National Bank v. Burnet Man.

Co., 5 Stewart (N. J.), 236; Despatch Line of Packets v. Bellamy Man. Co., 12 N. H. 205; Hughes v. Parker, 20 N. H. 58; Nashua Fire Ins. Co. v. Moore, 55 N. H. 48; Penobscot & K. R. Co. v. Dunn, 39 Me. 587, 599; Bucksport & B. R. Co. v. Buck, 68 Me. 81, 65 Me. 536; Cahill v. Kalamazoo Mut. Ins. Co., 2 Dong. (Mich.) 124; Cincinnati, L., & C. R. Co. v. Danville & V. R. Co., 75 Ill. 113; Atlantic T. & O. R. Co. v. Johnston, 70 N. C. 348; Ohio & M. R. Co. v. McPherson, 35 Mo. 13; Chamberlain v. Painesville & H. R. Co., 15 Ohio St. 225; Clarke v. Thomas, 34 Ohio St. 46, 58; Eakright v. Logansport & N. I. R. Co., 13 Ind. 404; 2 Kent Com. 295.

⁹ Thorington v. Gould, 59 Ala. 461; People v. Twaddell, 18 Hun, 427; Penobscot & K. R. Co. v. Dunn, 39 Me. 587, 599.

restrain directors from illegal action, it is not necessary to prove their title *de jure*; but it is sufficient to show that they are acting as directors.¹ A clerk continues in office until his successor is appointed, unless his term is limited by statute or by-law.²

Remedy for Illegal Elections. — The usual remedy for determining the title to corporate offices is by *quo warranto*, in which a judgment of ouster is given against parties who have usurped them.³ The judgment will not have the effect to give the election to the defeated party, who claims to have had a majority of votes, but to require a new election.⁴ The remedy is criminal in form, but civil in nature, and is granted at discretion;⁵ and, the issue being a legal one, there may be a trial by jury.⁶ *Mandamus* will lie, on the petition of the corporation, to compel the surrender to its lawful officers of its books and papers held by persons who have usurped the offices by means of illegal votes, although the usurpers are in possession under a claim of right, and are exercising the functions annexed to the offices.⁷ It is a proper remedy to compel officers to call a meeting for an election.⁸ A court of equity will not entertain a bill to determine the validity of an election, but, having jurisdiction of the subject-matter of a controversy, — as, for instance, a breach of trust, — it may, for the purposes of the suit, pass upon the title to an office, and restrain parties unlawfully claiming it; the decree, however, will not effect an ouster or determine finally the title.⁹

Place of Meeting of the Corporation and of the Directors. — Upon the principle that the legal existence of a corporation is confined to the limits of the sovereignty creating it, its corporate meetings should be held within those limits. This restriction applies to all

¹ *Morrill v. Boston & M. R.*, 58 N. H. 68.

² *South Meadow Dam Co. v. Gray*, 30 Me. 547.

³ *State v. McDaniel*, 22 Ohio St. 354; *Hoppin v. Buffum*, 9 R. I. 513; *People v. Albany & S. R. Co.*, 1 Lans. 308, 55 Barb. 344; *Owen v. Whitaker*, 5 C. E. Green, 122; *State v. Smith*, 48 Vt. 266; *State v. New Orleans, J., & G. N. R. Co.*, 20 La. An. 489; *Miller v. State*, 15 Wall. 478; *Angell & A. on Corp.*, ch. 21.

⁴ *State v. McDaniel*, 22 Ohio St. 354; *People v. Phillips*, 1 Den. 388.

⁵ *State v. McDaniel*, 22 Ohio St. 354; *State v. Smith*, 48 Vt. 266.

⁶ *People v. Albany & S. R. Co.*, 57 N. Y. 161, 5 Lans. 25.

⁷ *American Railway-Frog Co. v. Haven*, 101 Mass. 398; *Melvin v. Hoitt*, 52 N. H. 61; *State v. Goll*, 3 Vroom, 285; *Angell & A. on Corp.* ch. 20.

⁸ *People v. Albany Hospital*, 61 Barb. 397; *State v. Wright*, 10 Nev. 167; *Owen v. Whitaker*, 5 C. E. Green, 122.

⁹ *Johnston v. Jones*, 8 C. E. Green, 216; *Mechanics' National Bank v. Burnet Man. Co.*, 5 Stewart (N. J.), 236; *Pond v. Vt. Valley R. Co.*, 12 Blatch. 280.

meetings of stockholders, and particularly to the meeting for organization. Accordingly, it has been held that corporate action, like the election of directors and the making of assessments upon stock, at meetings held without the State, is illegal. Some authorities go to the length of treating it as a nullity,¹ while others regard it only as voidable, and hold the corporation to be estopped from setting up the defence;² and parties who have contracted with it, or recognized its action, to be estopped from taking advantage of the irregularity.³ A corporation may, however, unless prohibited by statute, perform many acts outside of the jurisdiction which created it, — such as making contracts, and doing various kinds of business.⁴ The directors may, when personally outside of the State, make such contracts and do such business in its behalf; and they may, according to the current of the authorities, when so absent from the domicile of the corporation, hold meetings for the transaction of business. They are, when so met, regarded as acting in the capacity of agents of the corporation rather than as the corporation itself.⁵ Thus they may at such meetings execute contracts, deeds, and mortgages, or authorize their execution,⁶ appoint a secretary,⁷ or even, it has been considered, issue certificates of stock.⁸

A corporation which has received a charter in like terms from different States may hold its meetings in each.⁹ The corporation, by keeping its principal place of business and its records, and holding its meetings in a foreign State, has been deemed to have committed a breach of duty, which would be a sufficient ground for declaring a forfeiture of its charter.¹⁰ Its acts have also been

¹ *Miller v. Ewer*, 27 Me. 509; *Freeman v. Machias Water Power & M. Co.*, 38 Me. 343; *Ormsby v. Vt. Copper M. Co.*, 56 N. Y. 623; *Hilles v. Parrish*, 1 McCarter (N. J.), 380; *Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492.

² *Heath v. Silverthorn L. M. & S. Co.*, 39 Wis. 146.

³ *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13.

⁴ *Merrick v. Van Santvoord*, 34 N. Y. 208, 38 Barb. 574.

⁵ *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13; *Wood Hydraulic H. M. Co. v. King*, 45 Ga. 34; *Smith v. Alvord*, 63 Barb. 415; *Coe v. New Jersey Midland R. Co.*, 4 Stewart, 105, 117.

⁶ *Arms v. Conant*, 36 Vt. 744; *Wright v. Bundy*, 11 Ind. 398; *Bellows v. Todd*, 39 Iowa, 209; *Galveston R. Co. v. Cowdrey*, 11 Wall. 459; *Coe v. New Jersey Midland R. Co.*, 4 Stewart, 105, 117; *Wood Hydraulic H. M. Co. v. King*, 45 Ga. 34; *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13.

⁷ *McCall v. Byram Man. Co.*, 6 Conn. 428.

⁸ *Courtright v. Deeds*, 37 Iowa, 503. But see *Hilles v. Parrish*, 1 McCarter (N. J.), 380.

⁹ *Covington & C. Bridge Co. v. Mayer*, 31 Ohio St. 317.

¹⁰ *State v. Mil., L. S., & W. R. Co.*, 45 Wis. 579.

denied validity where it had, by holding its meetings and doing other corporate action abroad, practically transferred itself to another State.¹

Rule of the Majority . a Quorum. — The majority governs in the management of corporations. This rule is subject to the usual statute provision which allows voting by shares instead of voting *per capita*.² What constitutes a quorum for the transaction of business may be regulated by statute ; but if not, at a meeting of the whole body, — that is, the stockholders, a majority of those present determines corporate action ; while at a meeting of a select and definite body, as the board of directors, a majority is required for a quorum ; and then a majority of such quorum decides.³

The rules of the common law as to the number of votes required for corporate action may be varied by statute,⁴ and by reasonable by-laws of the corporation. A by-law making five out of twenty-three directors a quorum has been held valid ;⁵ and the number who usually act has been held to be a quorum.⁶ An interested director should not be counted as a part of the quorum.⁷ The whole number should have an opportunity to be present, although a less number is made a quorum ; but if the statute declares a certain number to be a quorum, and neither the statute nor the by-laws require notice, a notice to the rest is not essential to the validity of the action of the number named.⁸ Meetings of directors are presumed to have been legally notified, and formality in

¹ *Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492. But see *Merrick v. Van Santvoord*, 34 N. Y. 208.

² *Angell & A. on Corp.* § 499; *Cushing's Law and Practice of Legislative Assemblies*, §§ 115, 412; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 407, 9 C. E. Green, 455; *Covington v. Covington & C. Bridge Co.*, 10 Bush, 69. The privilege of "cumulative" voting in the election of directors is allowed by the constitution of Pennsylvania. *Hays v. Commonwealth*, 82 Pa. St. 518.

³ *Willcocks's Case*, 7 Cowen, 402; *Field v. Field*, 9 Wend. 394, 403; *Craig v. First Presbyterian Church*, 88 Pa. St. 42; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124; *Price v. Grand Rapids & I. R. Co.*, 13 Ind. 58; *Junction R. Co. v. Reeve*, 15 Ind. 236; *People v.*

Twaddell, 18 Hun, 427, 430; *Cram v. Bangor House Proprietary*, 12 Me. 354; *Monmouth Mut. Fire Ins. Co. v. Lowell*, 59 Me. 504; *Sargent v. Webster*, 13 Met. 497; *Despatch Line of Packets v. Bellamy Man. Co.*, 12 N. H. 205; *Edgerly v. Emerson*, 23 N. H. 555; *Wells v. Rahway White Rubber Co.*, 4 C. E. Green, 402; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; *Buell v. Buckingham*, 16 Iowa, 284; 2 Kent Com. 293; *Angell & A. on Corp.* §§ 501, 502.

⁴ *Lane v. Brainerd*, 30 Conn. 565; 2 Kent Com. 293.

⁵ *Hoyt v. Thompson*, 19 N. Y. 207.

⁶ *Lyster's Case*, L. R. 4 Eq. Cas. 233.

⁷ *Butts v. Wood*, 37 N. Y. 317; *Ernest v. Nicholls*, 6 H. L. C. 401, 416.

⁸ *Edgerly v. Emerson*, 23 N. H. 555; *State v. Smith*, 48 Vt. 266.

the notice is not required.¹ The majority, whether directors or stockholders, may be restrained when it undertakes to deal with the corporate property in a manner not authorized by law; but equity will not interfere, at the instance of a minority, to control the discretion of the majority when acting within its powers.² Statutes sometimes require the assent of a larger proportion than a majority of the stockholders, as essential to corporate action.³ The corporation cannot, without the unanimous consent of the stockholders, condone gratuitously the fraud of its officers.⁴

Mode in which Directors act. — The regular mode by which directors act is by vote at a meeting; but the separate assent of a majority is held in ordinary matters, as in the appointment of agents, to be equivalent to formal action where they are accustomed to act by giving their assent separately.⁵ Such assent may be implied as well as express, and it may be implied from acquiescence and the course of business.⁶ But corporate acts which can be done by the directors only should be done by them as a board at a meeting, and not by separate assent;⁷ and the directors, in order to make the act a corporate one, should act as directors, and not in some other capacity.⁸ A by-law which prescribes a mode of action may be modified by practice,⁹ but a statute pre-

¹ *Sargent v. Webster*, 13 Met. 497; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587, 600; *Lane v. Brainerd*, 30 Conn. 565; *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa, 437.

² *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545; *Kean v. Johnson*, 1 Stock. 401; *Gifford v. New Jersey R. & T. Co.*, 2 Stock. 171; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 9 C. E. Green, 455; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42; *Mowrey v. Indianapolis & C. R. Co.*, 4 Biss. 78; *Treadwell v. Salisbury Man. Co.*, 7 Gray, 393, *Durfee v. Old Colony & F. R. R. Co.*, 5 Allen, 230; *Barnard v. Vt. & M. R. Co.*, 7 Allen, 512; *Rogers v. Lafayette Agricultural Works*, 52 Ind. 296; *Sprague v. Illinois River R. Co.*, 19 Ill. 174; *Bach v. Pacific Mail Steamship Co.*, 12 Abbott Pr. N. S. 373; *Hedges v. Paquett*, 3 Oreg. 77; *East Tennessee & V. R. Co. v. Gammon*, 5 Sneed, 567; *Pratt v. Pratt*, 33 Conn. 446.

³ *Joslyn v. Pacific Mail Steamship Co.*, 12 Abbott Pr. N. S. 329.

⁴ *Hazard v. Durant*, 11 R. I. 195.

⁵ *Bank of Middlebury v. Rutland & W. R. Co.*, 30 Vt. 159; *Foot v. Rutland & W. R. Co.*, 32 Vt. 633; *Bradstreet v. Bank of Royalton*, 42 Vt. 128; *Rogers v. Hastings & D. R. Co.*, 22 Minn. 25; *Bee v. San Francisco & H. B. R. Co.*, 46 Cal. 248.

⁶ *Sherman v. Fitch*, 98 Mass. 59; *Lyndeborough Glass Co. v. Mass. Glass Co.*, 111 Mass. 315; *Pittsburg & C. R. Co. v. Clarke*, 29 Pa. St. 146, 152.

⁷ *Johnston v. Jones*, 8 C. E. Green, 216; *Junction R. Co. v. Reeve*, 15 Ind. 236; *Despatch Line of Packets v. Bellamy Man. Co.*, 12 N. H. 205; *Edgerly v. Emerson*, 23 N. H. 555, 567; *Pittsburg & C. R. Co. v. Clarke*, 29 Pa. St. 146.

⁸ *Gashwiler v. Willis*, 33 Cal. 11. See *People v. Sterling Man. Co.*, 82 Ill. 457.

⁹ *Pittsburg & C. R. Co. v. Clarke*, 29 Pa. St. 146.

scribing a mode must be followed.¹ A record of the votes of directors is not essential to their validity, and they may be proved by parol evidence; but a record, if made, is the best evidence of their action.²

Compensation of Directors.—The directors are presumed to perform the duties of their trust gratuitously. They are not entitled to compensation, even for services outside of the ordinary duties of their office, unless it is expressly stipulated before the services are rendered; but an express contract by the board to pay a fixed or reasonable sum is binding. Some authorities require a vote or resolution as evidence of the agreement, while others do not regard such formal action as essential where there is an actual employment.³ A subsequent vote of the board to pay a director for his services, where there was no previous agreement, is not binding.⁴ The expectation of a director that he was to receive compensation, there being no previous vote or promise, does not entitle him to it.⁵

The rule which excludes compensation applies to the president chosen by the directors from their own number,⁶ and also to a treasurer, when a director;⁷ but not to officers and agents not being directors, who are entitled to recover on a *quantum meruit* where no price is fixed.⁸ It does not prevent recovery for advances of money on an implied promise to repay.⁹

¹ *Pittsburg & C. R. Co. v. Clarke*, 29 Pa. St. 146, 152.

² *Edgerly v. Emerson*, 23 N. H. 555; *Cram v. Bangor House Proprietary*, 12 Me. 354; *Langsdale v. Bouton*, 12 Ind. 467. See *Junction R. Co. v. Reeve*, 15 Ind. 236.

³ *Hall v. Vt. & M. R. Co.*, 28 Vt. 401; *Henry v. Rutland & B. R. Co.*, 27 Vt. 435; *Hodges v. Rutland & B. R. Co.*, 29 Vt. 220; *Chandler v. Monmouth Bank*, 1 Green (N. J.), 255; *American Cent. R. Co. v. Miles*, 52 Ill. 174; *Rockford, R. I., & St. L. R. Co. v. Sage*, 65 Ill. 328; *Gridley v. Lafayette, B., & M. R. Co.*, 71 Ill. 200; *Cheeny v. Lafayette, B., & M. R. Co.*, 68 Ill. 570, 87 Ill. 446; *Illinois Linen Co. v. Hough*, 91 Ill. 63; *Maux Ferry Gravel Road Co. v. Branegan*, 40 Ind. 361; *Butts v. Wood*, 37 N. Y. 317; *Jackson v. New York Cent. R. Co.*, 2 Thomp. & C. 653; *Bailey v. Buffalo C. R. Co.*, 14 Hun. 483; *Angell & A. on Corp.* § 317.

Pa. St. 534; *Holder v. Lafayette, B., & M. R. Co.*, 71 Ill. 106; *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170; *Maux Ferry Gravel Road Co. v. Branegan*, 40 Ind. 361.

⁶ *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170.

⁷ *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Gridley v. Lafayette B., & M. R. Co.*, 71 Ill. 200; *Levisse v. Shreveport City R. Co.*, 27 La. An. 641; *Kilpatrick v. Penrose Ferry Bridge Co.*, 49 Pa. St. 118. See *Commonwealth Ins. Co. v. Crane*, 6 Met. 64.

⁸ *Holder v. Lafayette, B., & M. R. Co.*, 71 Ill. 106.

⁹ *Rogers v. Hastings & D. R. Co.*, 22 Minn. 25; *Missouri River R. Co. v. Richards*, 8 Kan. 101; *Fraylor v. Sonora Mining Co.*, 17 Cal. 594; *Angell & A. on Corp.* § 317.

⁹ *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Gridley v. Lafayette, B., & M. R. Co.*, 71 Ill. 200.

The presumption that a director's service is gratuitous is by some authorities held not to apply to services which are of a special or extraordinary character, or lie outside of a director's duty.¹ Thus, while his services in procuring contracts for construction have been held to pertain to such duty, his services in soliciting and obtaining subscriptions to the capital stock have been held to be outside of it, the implication being in favor of an agreement to compensate for the latter but not for the former.² In one case the presumption that the service was gratuitous was held to apply only to attendance at meetings of the board.³

Powers of Directors.—The directors have generally, except as limited by statute, the powers of the corporation, and exercise an original rather than a delegated authority. The stockholders elect the directors, and exercise such other powers as are conferred upon them by statute; but the immediate government and direction of the corporation belong to the directors.⁴ The powers conferred on the directors must be executed by them, and cannot be executed by the stockholders.⁵ The discretion of directors exercised in good faith upon matters within their powers are not subject to judicial revision.⁶ They represent the corporation in the courts, and can alone be heard in its behalf, except in a proper proceeding against them for a breach of trust.⁷

¹ *Hall v. Vt. & M. R. Co.*, 28 Vt. 401; *Gridley v. Lafayette, B., & M. R. Co.*, 71 Ill. 200; *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170; *Rogers v. Hastings & D. R. Co.*, 22 Minn. 25; *Santa Clara Mining Assoc. v. Meredith*, 49 Md. 389. See *Levissee v. Shreveport City R. Co.*, 27 La. An. 641.

² *Cheaney v. Lafayette, B., & M. R. Co.*, 68 Ill. 570, 87 Ill. 446. See *Hall v. Vt. & M. R. Co.*, 28 Vt. 401; *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170.

³ *Shackelford v. New Orleans, J., & G. N. R. Co.*, 37 Miss. 202.

⁴ *Dana v. Bank of United States*, 5 W. & S. 223, 240; *Bank of Middlebury v. Rutland & W. R. Co.*, 30 Vt. 159; *Miller v. Rutland & W. R. Co.*, 36 Vt. 452; *State v. Smith*, 48 Vt. 266; *Shaw v. Norfolk County R. Co.*, 16 Gray, 407; *Burrill v. Nahant Bank*, 2 Met. 163; *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *Hoyt v. Thompson*, 19 N. Y. 207, 216; *Wood Hydraulic Hose M. Co. v. King*, 45 Ga. 34; *Dayton & C. R. Co. v. Hatch*, 1 Disney,

84, 91; *Wright v. Oroville Mining Co.*, 40 Cal. 20; *Watts's Appeal*, 78 Pa. St. 370; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Angell & A. on Corp.* §§ 231, 279, 280, 299. A by-law sometimes confers the power expressly. *Hendee v. Pinkerton*, 14 Allen, 381. The authority of the corporation may be presumed from acquiescence. *Miller v. Rutland & W. R. Co.*, 36 Vt. 452.

⁵ *Gashwiler v. Willis*, 33 Cal. 11; *Conro v. Port Henry Iron Co.*, 12 Barb. 27. See *People v. Sterling Man. Co.*, 82 Ill. 457.

⁶ *Baltimore v. Balt. & O. R. Co.*, 21 Md. 50; *Lagrange v. State Treasurer*, 24 Mich. 468; *Cass v. Pittsburg, V., & C. R. Co.*, 80 Pa. St. 31; *Smith v. Prattville Man. Co.*, 29 Ala. 503; *Turquand v. Marshall, L. R.* 4 Ch. App. 376, L. R. 6 Eq. Cas. 112.

⁷ *United States v. Union Pacific R. Co.*, 98 U. S. 569, 611; *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463; *Pacific R. Co. v. Ketchum*, 101 U. S. 289.

Their discretion in paying the funds of the corporation for injuries and losses to parties having a just but not a strictly legal claim will not be controlled where they have acted in good faith for its interests.¹ They have been restrained from fixing a time for the meetings of the company for the purpose of preventing shareholders from exercising their voting powers.²

The directors may borrow money for the corporation, issue its bonds for loans obtained for it, sell, lease, and mortgage its property.³ They may cancel bonds which are a lien on the road, and have become the property of the corporation,⁴ and sell the shares of the capital stock of which the corporation itself is the owner.⁵ They may, on behalf of the corporation, accept amendments of its charter,⁶ and institute and carry on proceedings for taking land which it has been authorized to take.⁷ They cannot alienate any property or franchises which the corporation itself cannot alienate; and their power is by some authorities restricted still further, so as to disable them from making, without special authority, any organic and fundamental changes, such as increasing the capital stock,⁸ or alienating property or rights which are essential to the transaction of the corporate business.⁹ They cannot release certain subscribers to the capital stock from their liability to pay for the same, where such release would be a fraud upon other subscribers.¹⁰

The deed of a corporation, executed by its officers in its behalf, is presumed to be its deed.¹¹ It should, in order to take effect as

¹ *Taunton v. Royal Ins. Co.*, 2 H. & M. 135.

² *Cannon v. Trask*, L. R. 20 Eq. Cas. 669.

³ *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 407, 9 C. E. Green, 455; *Hendee v. Pinkerton*, 14 Allen, 381; *Sargent v. Webster*, 13 Met. 497.

⁴ *Shaw v. Norfolk County R. Co.*, 16 Gray, 407.

⁵ *State v. Smith*, 48 Vt. 266.

⁶ *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125; *Dayton & C. R. Co. v. Hatch*, 1 Disney, 84; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654, 661; *ante*, p. 5.

⁷ *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125.

⁸ *Chicago City R. Co. v. Allerton*, 18 Wall. 233; *Eidman v. Bowman*, 58 Ill. 444; *Finley Shoe & L. Co. v. Kurtz*,

34 Mich. 89. But see, as to the effect of acquiescence by the corporation in such increase by the directors, *Payson v. Stoever*, 2 Dill. 427.

⁹ *Abbot v. American Hard Rubber Co.*, 33 Barb. 578; *Stevens v. Davison*, 18 Gratt. 819; *Rollins v. Clay*, 33 Me. 132; *Burke v. Smith*, 16 Wall. 390, 395; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 407, 9 C. E. Green, 455; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Bank Com'rs v. Bank of Brest, Harrington* (Mich.), 106.

¹⁰ *Bedford R. Co. v. Bowser*, 48 Pa. St. 29. See *Burke v. Smith*, 16 Wall. 390; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587.

¹¹ *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228, 3 Mo. App. 315; *Thorington v. Gould*, 59 Ala. 461.

its deed, be executed in its name; but if the officers, having due authority to make the deed in its behalf, execute it in their own name, it will be treated as an equitable mortgage.¹

Wherever the corporation can authorize the directors to do an act, its subsequent ratification is equivalent to a previous authority.² The State also may, by a subsequent legislative act, give validity to their unauthorized acts.³

Power to Delegate. — The directors may delegate their powers to agents; and the president or other officer, or a committee which may be less than a quorum of the board of directors, may be such agents. The power may be conferred by previous authority, or by subsequent ratification;⁴ by acts implying a delegation or ratification as well as expressly.⁵ Where a duty imposed by statute requires the exercise of the personal discretion of the directors, it cannot be delegated.⁶ The directors cannot delegate the power to make calls, but may adopt the action of the executive committee in making them.⁷

Authority of the President or other Director. — The president or other director has no implied authority derived from his office to act as the agent of the corporation; but, like other agents, he must derive his power from the board of directors. Thus the president cannot, by virtue of his office, make contracts for the corporation, or sell its property or bonds, or release parties from liability to it under existing contracts.⁸ But he is often empowered by the by-laws or resolutions of the board, or by usage,

¹ *Miller v. Rutland & W. R. Co.*, 36 Vt. 452. See *Sherman v. Fitch*, 98 Mass. 59.

² *McLaughlin v. Detroit & M. R. Co.*, 8 Mich. 100.

³ *Coe v. New Jersey Midland R. Co.*, 4 Stewart (N. J.), 105, 117.

⁴ *Hoyt v. Thompson*, 19 N. Y. 207; *Oleott v. Tioga R. Co.*, 27 N. Y. 546, 558; *Miller v. Rutland & W. R. Co.*, 36 Vt. 452; *Burrill v. Nahant Bank*, 2 Met. 163; *Hazard v. Durant*, 11 R. I. 195; *Chicago & N. W. R. Co. v. James*, 24 Wis. 388; *Sherman v. Fitch*, 98 Mass. 59; *Darst v. Gale*, 83 Ill. 136; *Angell & A. on Corp.* § 299.

⁵ *Chicago Building Soc. v. Crowell*, 65 Ill. 453; *Santa Clara Mining Assoc. v. Meredith*, 49 Md. 389; *Union Gold Mining Co. v. Rocky Mt. Nat. Bank*, 96 U. S.

640, 2 Col. 248; *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

⁶ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

⁷ *Monmouth Mut. Fire Ins. Co. v. Lowell*, 59 Me. 504; *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Farmers' Mut. Fire Ins. Co. v. Chase*, 56 N. H. 341; *Silver Hook Road v. Greene*, 12 R. I. 164.

⁸ *Hoyt v. Thompson*, 5 N. Y. 320; *Risley v. Indianapolis, B. & W. R. Co.*, 1 Hun, 202; *Trundy v. Hartford & N. Y. Steamboat Co.*, 6 Rob. 312; *Corn Exchange Bank v. Cumberland Coal Co.*, 1 Bosw. 436; *Titus v. Cairo & F. R. Co.*, 8 Vroom, 98; *Walworth County Bank v. Farmers' Loan & T. Co.*, 14 Wis. 325, 16 Wis. 629; *Chicago & N. W. R. Co. v. James*, 22 Wis.

to act for the corporation in divers matters;¹ and a subsequent ratification is equivalent to a previous authority.² When authorized by a by-law to act as the company's business and financial agent, his authority is confined to its ordinary business, and does not extend to the selling or mortgaging of its property;³ but a managing officer has an implied authority to employ an attorney or legal adviser,⁴ or a physician to attend an employee injured in the company's service.⁵ The president's admissions bind the corporation only when made within the scope of his authority, and as a part of the *res gestæ*.⁶

A Director's Knowledge.—Notice to a director, or his knowledge, affects the corporation only when the notice is given to him, or the knowledge is acquired by him while he is acting as its agent or in an official capacity, and his mere private and personal knowledge cannot be imputed to it.⁷ The corporation is not affected with his knowledge where he is acting adversely to it,⁸ or in a transaction occurring after his service as an officer has ended.⁹ Notice to the board of directors when in session binds the corporation.¹⁰

194; *New Haven & N. Co. v. Hayden*, 107 Mass. 525; *Mahone v. Manchester & L. R. Co.*, 111 Mass. 72; *Custar v. Titusville Gas & W. Co.*, 63 Pa. St. 381; *Hendrickson v. New York & A. R. Co.* (N. Y. Supreme Ct., April, 1880), 10 N. Y. Week. Dig. 33. But see *Richmond F. & P. R. Co. v. Snead*, 19 Gratt. 354.

¹ *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297; *Mitchell v. Deeds*, 49 Ill. 416; *East New York & J. R. Co. v. Lighthall*, 6 Rob. 407; *Pittsburg & C. R. Co. v. Stewart*, 41 Pa. St. 54. Under a statute of New Hampshire the directors are presumed to be the general agents of the corporation. *Morrill v. Boston & M. R.*, 58 N. H. 68.

² *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *Pixley v. Western Pacific R. Co.*, 33 Cal. 183; *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89; *Pittsburg, C., & St. L. R. Co. v. Woolley*, 12 Bush, 451.

³ *Luse v. Isthmus Transit R. Co.*, 6 Oreg. 125.

⁴ *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

⁵ *Pacific R. Co. v. Thomas*, 19 Kan. 256.

⁶ *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297; *Stoystown & G. Turnp. R. Co. v. Craver*, 45 Pa. St. 386; *Angell & A. on Corp.* § 309.

⁷ *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Pittsburg, C., & St. L. R. Co. v. Woolley*, 12 Bush, 451; *Farrell Foundry v. Dart*, 26 Conn. 376; *Smith v. Board of Water Com'rs*, 38 Conn. 208; *Great Western R. Co. v. Wheeler*, 20 Mich. 419; *National Security Bank v. Cushman*, 121 Mass. 490; *First National Bank v. Christopher*, 11 Vroom, 435; *First National Bank v. Gifford*, 47 Iowa, 575; *Wharton on Agency*, §§ 183, 184, 673; *Story on Agency*, § 140, b, c, d. In *Factors' & T. Ins. Co. v. Marine Dry Dock & S. Co.*, 31 La. An. 149, it is held that "a corporation must be held to know what its president and chief officers know."

⁸ *Barnes v. Trenton Gas Light Co.*, 12 C. E. Green, 33; *First National Bank v. Gifford*, 47 Iowa, 575. See *Ryan v. Leavenworth, A., & N. W. R. Co.*, 21 Kan. 365, 405.

⁹ *Great Western R. Co. v. Wheeler*, 20 Mich. 419.

¹⁰ *Angell & A. on Corp.* §§ 305, 309.

Directors as Trustees.—Directors, though not technically trustees, stand in a fiduciary relation to the corporation, and are under the disabilities of trustees. They are bound to use their best judgment and skill in the service of the corporation, and are not allowed to enter into contracts and relations which are likely to bring into conflict their duty and their self-interest, and tempt them to be unfaithful to the superior obligations they have assumed. A director, therefore, as a buyer for the corporation, cannot buy of himself, or, as a seller for the corporation, become the purchaser; or, being its agent and trustee, contract with himself, or take positions or acquire interests adverse to his trust, or secure to himself advantages not common to other stockholders.¹ The rule is so strict that it does not permit, as against a disapproving *cestui que trust*, an inquiry into the good faith and fairness of a transaction which comes within it.² The right of disapproval belongs, however, only to the *cestui que trust*.³

A director is a trustee, not only when participating in the meetings of the board, or in executing powers specially delegated to him, but he is always a trustee while he remains a director. The knowledge which he has obtained as director cannot, while he continues in office, be used for his private advantage.⁴ The fact that

¹ Great Luxembourg R. Co. v. Magnay, 25 Beav. 586; Aberdeen R. Co. v. Blaikie, 1 Macq. 461; Michoud v. Girod, 4 How. 503; Koehler v. Black River Falls Iron Co., 2 Black, 715; Cumberland Coal & I. Co. v. Sherman, 30 Barb. 553; Butts v. Wood, 37 N. Y. 317, 38 Barb. 181; Coleman v. Second Av. R. Co., 38 N. Y. 201, 48 Barb. 371; Barnes v. Brown, 80 N. Y. 527; Farmers' & M. Bank v. Downey, 53 Cal. 466; Port v. Russell, 36 Ind. 60; Cook v. Berlin Woollen Mill Co., 43 Wis. 433; Cumberland Coal & I. Co. v. Parish, 42 Md. 598; Covington & L. R. Co. v. Bowler, 9 Bush, 468; First National Bank v. Gifford, 47 Iowa, 575; European & N. A. R. Co. v. Poor, 59 Me. 277; 1 Story Eq. Jur. § 322. See Erlanger v. New Sombrero Phosphate Co., L. R. 3 App. Cas. 1218. The rule of the civil law was the same, *Tutor rem pupili emere non potest: idemque porrigendum est ad similia; id est ad curatores, procuratores, et qui negotia aliena gerunt*. A director may secure a personal debt to himself by a pledge of shares in the corporation owned by the

debtor, although the latter is indebted also to the corporation. Farmers' & M. Bank v. Wasson, 48 Iowa, 336.

² Stewart v. Lehigh Valley R. Co., 9 Vroom, 505; Gilman, C., & S. R. Co. v. Kelly, 77 Ill. 426; Flint & P. M. R. Co. v. Dewey, 14 Mich. 477; Aberdeen R. Co. v. Blaikie, 1 Macq. 461. Some authorities hold that the transaction will stand if the director on whom is the burden of proof establishes its perfect fairness, adequacy, and equity: Cumberland Coal & I. Co. v. Parish, 42 Md. 598; Ashhurst's Appeal, 60 Pa. St. 290; Watts's Appeal, 78 Pa. St. 370; while others go even farther, and treat the contract valid in the absence of proof of fraud. Buell v. Buckingham, 16 Iowa, 284; Merrick v. Peru Coal Co., 61 Ill. 472.

³ Stewart v. Lehigh Valley R. Co., 9 Vroom, 505; United States v. Union Pacific R. Co., 98 U. S. 569, 609, 610; Taylor's Case, L. R. 14 Ch. Div. 390.

⁴ Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314. See Imperial Merc. Credit Assoc. v. Coleman, L. R. 6 Ch. App. 855.

he abstained from participating in the action of the directors at the time of the prohibited transaction does not remove the taint, as it was his duty to be active in his trust, and for that purpose to keep himself clear of embarrassing positions.¹ Nor will it avail a trustee, seeking to maintain the contract, that it was the best one which could have been made for the corporation.² The rule is the same, whether the director entered into the contract at its inception, or acquired an interest in it subsequently;³ whether he was a sole director, or one of a body; whether he was a sole or joint contractor, or whether the contract made while he was a director was modified after he ceased to be such.⁴ It has been held to disable him from receiving a share of the profits of a contract made with another corporation of which he is a member, whether he was a member at the time or became one later.⁵ The contract is voidable by the corporation against other parties who, being co-contractors with the director, knew his fiduciary character.⁶

A director cannot buy corporate property directly or indirectly;⁷ he cannot buy at a sale on execution,⁸ or at a judicial sale.⁹ He cannot make a profit out of sales made by him to the corporation, as by buying at one price for himself and selling at a higher one to the corporation;¹⁰ nor can he enforce an executory contract for furnishing supplies to the corporation.¹¹ He cannot make a profit out of shares of the capital stock belonging to the corporation, which were placed in his hands for sale,¹² or receive

where the articles of association were construed as allowing a director to have an interest in business brought by him to the company.

¹ *Stewart v. Lehigh Valley R. Co.*, 9 Vroom, 505.

² *Ib.*; *Aberdeen R. Co. v. Blaikie*, 1 Macq. 461.

³ *European & N. A. R. Co. v. Poor*, 59 Me. 277.

⁴ *Aberdeen R. Co. v. Blaikie*, 1 Macq. 461.

⁵ *Gilman, C., & S. R. Co. v. Kelly*, 77 Ill. 426.

⁶ *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.*, 16 Md. 456; *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 485.

⁷ *Abbot v. American Hard Rubber Co.*, 33 Barb. 578; *Wilson v. Central Bridge*, 9 R. I. 590; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433; *Hoffman Steam*

Coal Co. v. Cumberland Coal & I. Co., 16 Md. 456.

⁸ *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314; but *quære* as to his right to buy at a sale on an execution in his own favor, or on a prior execution, where he could not otherwise protect himself. *Id.* See *Harts v. Brown*, 77 Ill. 226.

⁹ *Covington & L. R. Co. v. Bowler*, 9 Bush, 468.

¹⁰ *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 586; *Benson v. Heathorn*, 1 Y. & C. 326; *Simons v. Vulcan Oil & M. Co.*, 61 Pa. St. 202; *McElhenny's Appeal*, 61 Pa. St. 188; *Rice's Appeal*, 79 Pa. St. 168; *Getty v. Devlin*, 54 N. Y. 403.

¹¹ *Aberdeen R. Co. v. Blaikie*, 1 Macq. 461; *Flanagan v. Great Western R. Co.*, L. R. 7 Eq. Cas. 116.

¹² *York & M. N. R. Co. v. Hudson*, 16 Beav. 485.

a consideration for selecting a particular route for the railroad.¹ He cannot have an interest in contracts for the construction of the railroad made by the corporation with contractors; and the corporation may recover of him the profits he has received therefrom.² He cannot hold for himself property which it was his duty to acquire for the corporation; and, if acquired by him, he will hold the same as trustee for it. Thus, if he takes a deed of land to himself which he was deputed to buy for the corporation, or which, as a part of the location, is essential to its business, the purchase will inure to its benefit.³ He cannot treat purchases made by himself for the corporation as his own purchases in order to make a profit thereby.⁴

A director cannot, as a creditor of the corporation, secure an advantage to himself which is not common to all its creditors;⁵ nor can he purchase claims against it on his own account, and any purchase made by him will inure to its benefit;⁶ nor can he pledge or assign corporate property for the security or payment of his individual debt.⁷ A vote of the directors transferring property to any one of their number without consideration, or simply to induce him to do his duty, is void.⁸ Agreements for influencing the action of the directors to the prejudice of the corporation, or to enable the directors to keep the control of its management, are void.⁹ A director who receives from the promoters of the company a gift of shares, as an inducement to become a

¹ Holladay v. Davis, 5 Oreg. 40.

² European & N. A. R. Co. v. Poor, 59 Me. 277; Flint & P. M. R. Co. v. Dewey, 14 Mich. 477; Gilman, C., & S. R. Co. v. Kelly, 77 Ill. 426; Paine v. Lake Erie & L. R. Co., 31 Ind. 283; Port v. Russell, 36 Ind. 60; Ryan v. Leavenworth, A., & N. W. R. Co., 21 Kan. 365; Wardell v. Union Pacific R. Co., 4 Dill. 330; 5 Cent. Law J. 527; United States v. Union Pacific R. Co., 98 U. S. 569, 610; Thomas v. Brownville, Ft. K., & P. R. Co. (U. S. C. C., D. Neb., May, 1880), 2 Fed. Rep. 877.

³ Blake v. Buffalo Creek R. Co., 56 N. Y. 485; Buffalo, N. Y., & E. R. Co. v. Lampson, 47 Barb. 533.

⁴ Blair Town Lot & L. Co. v. Walker, 50 Iowa, 376.

⁵ Koehler v. Black River Falls I. Co., 2 Black, 715; Emporium Real Estate & M. Co. v. Emrie, 54 Ill. 345; Cumberland

Coal & I. Co. v. Parish, 42 Md. 598; Bennett's Case, 18 Beav. 339. See Smith v. Lansing, 22 N. Y. 520; Murray v. Vanderbilt, 39 Barb. 140. He may buy the bonds of the corporation. Harts v. Brown, 77 Ill. 226.

⁶ Kimmell v. Geeting, 2 Grant, 125; McDonald v. Haughton, 70 N. C. 393; Brewster v. Stratman, 4 Mo. App. 41; European & N. A. R. Co. v. Poor, 59 Me. 277, 279; Ryan v. Leavenworth, A., & N. W. R. Co., 21 Kan. 365, 398. But see Bradley v. Williams, 3 Hughes, 26; Merrick v. Peru Coal Co., 61 Ill. 472.

⁷ Conro v. Port Henry Iron Co., 12 Barb. 27.

⁸ Hilles v. Parrish, 1 McCarter (N. J.), 380; Butts v. Wood, 37 N. Y. 317, 38 Barb. 181.

⁹ Bliss v. Matteson, 45 N. Y. 22; Northern R. v. Concord R., 50 N. H. 166.

director, may be compelled to restore them, or to account to the company for their highest value while in his possession.¹

A director may lend money to, or make advances for, the corporation,² and he is entitled to reimbursement for advances in its behalf made in good faith, although it had no power to borrow.³ A mere stockholder does not stand in a fiduciary relation to the corporation.⁴

The contracts and transactions of a director, which involve a breach of his duty as trustee, are not void but voidable; and they are voidable only at the election of the corporation.⁵ Its right of election must be exercised within a reasonable time, and is lost by acquiescence.⁶ It must adopt or repudiate the contract or transaction altogether, and it must not disable itself from putting the director in the position he was in before it elected to reject.⁷ If it repudiates his purchase of the corporate property, it must reimburse him for the amount paid by him.⁸

The corporation may ratify the director's acts which are constructively a breach of trust,⁹ but the ratification without a knowledge of the facts will not estop it from repudiating the transaction.¹⁰ Its acquiescence is not to be presumed from its rejection of the director's unreasonable propositions.¹¹ A direc-

¹ *Nant-Y-Glo & B. I. Co. v. Grave*, L. R. 12 Ch. Div. 738; *McKay's Case*, L. R. 2 Ch. Div. 1; *Pearson's Case*, L. R. 5 Ch. Div. 336; *Carling's Case*, L. R. 20 Eq. Cas. 580.

² *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Bradly v. Williams*, 3 Hughes, 26; *Merrick v. Peru Coal Co.*, 61 Ill. 472; *Harts v. Brown*, 77 Ill. 226; *Darst v. Gale*, 83 Ill. 136; *Hotel Co. v. Wade*, 97 U. S. 13.

³ *Chippendale's Case*, 4 De Gex, M. & G. 19.

⁴ *Mickles v. Rochester City Bank*, 11 Paige, 118, 127; *Merrick v. Peru Coal Co.*, 61 Ill. 472.

⁵ *European & N. A. R. Co. v. Poor*, 59 Me. 277; *Stewart v. Lehigh Valley R. Co.*, 9 Vroom, 505; *Risley v. Indianapolis, B., & W. R. Co.*, 62 N. Y. 240, 1 Hun, 202, 4 Thomp. & C. 13; *Barnes v. Brown* (N. Y. Ct. App., 80 N. Y. 527), 10 N. Y. Week. Dig. 227; *Hedges v. Paquett*, 3 Oreg. 77. The fact that two corporations have, to some extent, the same directors, is not sufficient of itself to avoid a contract be-

tween the two corporations, at the instance merely of a stockholder of either, against its will. *Wallace v. Long Island R. Co.*, 12 Hun, 460.

⁶ *Ashhurst's Appeal*, 60 Pa. St. 290; *Watts's Appeal*, 78 Pa. St. 370; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Hayward v. National Bank*, 96 U. S. 611; *Ramsey v. Erie R. Co.*, 7 Abbott Pr. n. s. 156. But see *Thomas v. Brownville, Ft. K., & P. R. Co.* (U. S. C. C., D. Neb., May, 1880), 2 Fed. Rep. 877.

⁷ *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 586; *Risley v. Indianapolis, B., & W. R. Co.*, 62 N. Y. 240, 1 Hun, 202, 4 Thomp. & C. 13; *Peninsular Bank v. Hanmer*, 14 Mich. 208.

⁸ *Covington & L. R. Co. v. Bowler*, 9 Bush, 468.

⁹ *Hotel Co. v. Wade*, 97 U. S. 13.

¹⁰ *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.*, 16 Md. 456; *Gilman, C., & S. R. Co. v. Kelly*, 77 Ill. 426.

¹¹ *Covington & L. R. Co. v. Bowler*, 9 Bush, 468.

tor's fraud cannot be condoned by the board of directors, or by the stockholders, without unanimous consent.¹ A director does not stand in the relation of a trustee to individual stockholders; and his superior knowledge of the value of the shares of the capital stock, gained through his official position, will not, in the absence of fraudulent statements, affect his transactions with them in the purchase or sale of shares.²

Diligence in the Trust. — The directors are liable to the corporation for their own frauds and breaches of trust, and for those of subordinate agents, at which they have connived.³ Their liability is not confined to losses in transactions from which they have derived or sought some personal advantage. They are bound, in the discharge of their duties, to act in good faith and use ordinary diligence, but they are not liable for losses arising from mistakes of judgment. Thus they are liable for embezzlements by officers and agents whom they have appointed or kept in office, with knowledge that they were unworthy of trust. A director is not, however, a surety for the fidelity of such officers and agents; and where he took ordinary precautions, and had no grounds of suspicion, he is not liable for their misconduct, even though the fraud covered a long period, and a special scrutiny would have disclosed it. What should be the character of the supervision of directors over subordinate agents, how frequent and minute should be their examination of the books and property of the corporation, when their observation of the conduct of such agents may be in a great measure perfunctory, and when it must approach to espionage, — these and other considerations determining their liability must depend upon the facts of the case, the customs of the business, and the circumstances inviting confidence or suspicion.⁴

A director is not liable for ruinous investments of the cor-

¹ Hazard v. Durant, 11 R. I. 195; Paine v. Lake Erie & L. R. Co., 31 Ind. 283, 348; Thomas v. Brownville, Ft. K., & P. R. Co. (U. S. C. C., D. Neb., May, 1880), 2 Fed. Rep. 877.

² Board of Commissioners v. Reynolds, 44 Ind. 509.

³ Angell & A. on Corp. § 314; Robinson v. Smith, 3 Paige, 222; Sperring's Appeal, 71 Pa. St. 11; Watts's Appeal, 78 Pa. St. 370; Lewis v. St. Albans I. & S.

Works, 50 Vt. 477; York & N. M. R. Co. v. Hudson, 16 Beav. 485; Shea v. Mabry, 1 Lea (Tenn.), 319; Shea v. Knoxville & K. R. Co., 6 Baxter, 277; Van Dyck v. McQuade, 45 N. Y. Superior, 620.

⁴ Scott v. Depeyster, 1 Edw. Ch. 513, Sperring's Appeal, 71 Pa. St. 11; Dunn v. Kyle, 14 Bush, 134; Hodges v. New England Screw Co., 1 R. I. 312, 3 R. I. 9. See New York & N. H. R. Co. v.

porate property, except when made in bad faith or with *crassa negligentia*; and, in determining his liability, courts will not exact of him the high degree of caution which is approved by the judicial mind, but will judge his conduct by what was at the time customary and generally thought proper in such transactions.¹ It is suggested by some authorities, that not being technically a trustee, and being elected by stockholders, he is to be held to a less rigid liability than ordinary trustees.² Directors are not liable for losses occasioned by honest mistakes of the law; as where in good faith they make a prohibited investment, or perform acts *ultra vires*, or declare a dividend when there are no funds which can be legally appropriated for the purpose.³ Stockholders who have known and acquiesced in the illegal transactions cannot hold the directors responsible for losses occasioned by such transactions.⁴

Liability to the Public for Fraud.—A director who has made false statements, knowing them to be such, as to the condition of the corporation, or as to material facts affecting the value of its capital stock, is liable to parties to whom he made them, who relied upon his statements, and who suffered injury by giving them credit.⁵ The action being one for deceit, the statement, to be actionable, must be false, material in its kind, and have had the effect to mislead the injured party. Fraud of this kind may be committed in the way of false representations in a prospectus or report printed for general circulation. Any one who, relying upon such false representations, purchases the stock from the corporation, or from any owner thereof, has a right of action against any one or more directors who issued or sanctioned them; and no

Schuyler, 34 N. Y. 30, 57. The directors are not bound to require a bond of the treasurer where such is not the practice. *Scott v. Depeyster*, 1 Edw. Ch. 513. But a president has been held liable for not requiring a bond where the by-laws imposed on him the duty of requiring one. *Pontchartrain R. Co. v. Paulding*, 11 La. 41. As to his liability for omitting to bring a suit to recover a debt due to the corporation, see *Forest of Dean Coal M. Co., In re*, L. R. 10 Ch. Div. 450.

¹ *Overend & G. Co. v. Gibb*, L. R. 5 H. L. 480, L. R. 4 Ch. App. 701; *Turquand v. Marshall*, L. R. 4 Ch. App. 376,

L. R. 6 Eq. 112; *Spring's Appeal*, 71 Pa. St. 11.

² *Spring's Appeal*, 71 Pa. St. 11.

³ *Scott v. Depeyster*, 1 Edw. Ch. 513; *Spring's Appeal*, 71 Pa. St. 11; *Watts's Appeal*, 78 Pa. St. 370; *Hodges v. New England Screw Co.*, 1 R. I. 312, 3 R. I. 9; *Godbold v. Branch Bank of Mobile*, 11 Ala. 191; *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. 556. See *Turquand v. Marshall*, L. R. 4 Ch. App. 376, L. R. 6 Eq. Cas. 112.

⁴ *Scott v. Depeyster*, 1 Edw. Ch. 513; *Watts's Appeal*, 78 Pa. St. 370.

⁵ *Teague v. Irwin*, 127 Mass. 217.

other relation or privity between the parties need be shown.¹ The false statement, which was an inducement to the investment, need not have been the only inducement in order to make it actionable.² Where such false papers have been adopted by the corporation, its contract, as for the sale of its capital stock, with a party who put faith in them, may be set aside at his instance.³

The liability of directors for such publications is to be confined to statements of fact, peculiarly within their knowledge, and therefore attracting and justifying the special confidence of the public. Mere general declarations, although greatly exaggerated, of the prospects of an enterprise, do not, when proving erroneous, subject them to liability, these being matters of opinion in relation to which the public should be on its guard.⁴ The director's knowledge of the fraud, and participation in it, must be proved, and cannot be inferred merely from his official character;⁵ and if the false statements are made by agents, it must be shown that he authorized such agents to make them.⁶ Each director is liable for his own fraud, and not for that of his colleagues in which he did not participate.⁷ A director is not liable for an incorrect statement of a matter of law.⁸

¹ *Morgan v. Skiddy*, 62 N. Y. 319, 36 N. Y. Superior, 152; *Nelson v. Luling*, 36 N. Y. Superior, 544; *Newbery v. Garland*, 31 Barb. 121; *Morse v. Swits*, 19 How. Pr. 275; *Cross v. Sackett*, 2 Bosw. 617; *Vreeland v. New Jersey Stone Co.*, 2 Stewart (N. J.), 188; *Salmon v. Richardson*, 30 Conn. 360; *United Society of Shakers v. Underwood*, 9 Bush, 609; *Scott v. Dixon*, 1 El. & E. 1099; *Gerhard v. Bates*, 2 El. & Bl. 476; *Clarke v. Dickson*, 6 C. B. N. s. 453; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Davidson v. Tulloch*, 3 Macq. 783; *Burnes v. Pennell*, 2 H. L. Cas. 497; *Ross v. Estates Investment Co.*, L. R. 3 Eq. Cas. 122; *Kent v. Freehold L. & B. Co.*, L. R. 4 Eq. Cas. 588; *Hill v. Lane*, L. R. 11 Eq. Cas. 215; *Bigelow on Fraud*, ch. 1, § 6. See *Seizer v. Mali*, 32 Barb. 76; *Houldsworth v. Glasgow Bank*, L. R. 5 App. Cas. 317; *Henderson v. Lacon*, L. R. 5 Eq. Cas. 249. The case of *Peek v. Gurney*, L. R. 6 H. L. 377 (which overrules *Bagshaw v. Seymour*, 18 C. B. 908, and *Bedford v. Bagshaw*, 4 H. & N. 538),

limits the liability of the directors to parties who purchased of them, or were directly misled by them.

² *Morgan v. Skiddy*, 62 N. Y. 319, 36 N. Y. Superior, 152; *Clarke v. Dickson*, 6 C. B. N. s. 453.

³ *New Brunswick & C. R. & L. Co. v. Conybeare*, 9 H. L. Cas. 711, 1 Giffard, 339; *Central R. Co. v. Kisch*, L. R. 2 H. L. 99; *New Brunswick & C. R. & L. Co. v. Muggeridge*, 1 Drewry & S. 363. See *Bradley v. Poole*, 98 Mass. 169.

⁴ *Morgan v. Skiddy*, 62 N. Y. 319, 36 N. Y. Superior, 152; *New Brunswick & C. R. & L. Co. v. Conybeare*, 9 H. & L. Cas. 711.

⁵ *Wakeman v. Dalley*, 51 N. Y. 27; *Arthur v. Griswold*, 55 N. Y. 401; *Mabey v. Adams*, 3 Bosw. 346.

⁶ *Weir v. Barnett*, L. R. 3 Exch. Div. 32.

⁷ *Cargill v. Bower*, L. R. 10 Ch. Div. 502 (explaining *Peek v. Gurney*, L. R. 6 H. L. 377).

⁸ *Rashdale v. Ford*, L. R. 2 Eq. Cas. 750.

The directors are liable to the *bona fide* purchasers of spurious or overissued stock which they have fraudulently issued, whether such purchasers obtained it immediately from the directors or by assignment from other holders.¹

A bill against directors for abuse of trust is not multifarious for uniting various grounds of complaint, some applying only to a part of the directors, and other grounds applying only to other directors.² The jurisdiction of equity against directors for a waste or misapplication of the corporate funds is not excluded by the existence of a concurrent remedy at law.³

Suits against Directors.— A suit in equity may be sustained by the corporation against a director for fraud or breach of trust; and where the directors, being requested, refuse to bring a suit in the name of the corporation, a stockholder may bring the suit in his own name, for himself and others similarly situated, making proper allegations and joining the corporation as defendant.⁴ This remedy is confined to fraud and breaches of trust, and cannot be used to recover debts due to and property belonging to the corporation.⁵ Stockholders have a remedy in equity to prevent violations of the charter or acts *ultra vires* amounting to a breach of trust, or endangering the existence of the corpora-

¹ *Bruff v. Mali*, 36 N. Y. 200; *Cazeaux v. Mali*, 25 Barb. 578. See *post*, Chap. V., THE CAPITAL STOCK p. 127.

² *Lewis v. St. Albans I. & S. Works*, 50 Vt. 477.

³ *Citizens' Loan Assoc. v. Lyon*, 2 Stewart (N. J.), 110.

⁴ *Robinson v. Smith*, 3 Paige, 222; *Greaves v. Gouge*, 69 N. Y. 154, 16 Abbott Pr. n. s. 377; *Gray v. New York & V. Steamship Co.*, 3 Hun, 383; *Kean v. Johnson*, 1 Stock. 401; *Gifford v. New Jersey R. & T. Co.*, 2 Stock. 171; *Black v. Del. & R. C. Co.*, 7 C. E. Green, 130, 9 C. E. Green, 455; *Hazard v. Durant*, 11 R. I. 195; *Dodge v. Woolsey*, 18 How. 331; *Dewing v. Perdicaries*, 96 U. S. 193; *Morgan v. New Orleans, M., & C. R. Co.*, 1 Woods, 15; *Cogswell v. Bull*, 39 Cal. 320; *Wright v. Oroville Mining Co.*, 40 Cal. 20; *Lagrange v. State Treasurer*, 24 Mich. 468; *Cook v. Berlin Woollen Mill Co.*, 43 Wis. 433; *Rogers v. Lafayette Agricultural Works*, 52 Ind. 296; *Heath v. Erie R. Co.*, 8 Blatch. 347; *Pond v. Vt.*

Valley R. Co., 12 Blatch. 280; *Peabody v. Flint*, 6 Allen, 52; *Black v. Huggins*, 2 Tenn. Ch. 780; *March v. Eastern R. Co.*, 40 N. H. 548, 43 N. H. 515; *Ryan v. Leavenworth, A., & N. R. Co.*, 21 Kan. 365; *French v. Gifford*, 30 Iowa, 148; *Foss v. Harbottle*, 2 Hare, 461; *Gregory v. Patchett*, 33 Beav. 595; *Russell v. Wakefield Water Works Co.*, L. R. 20 Eq. Cas. 474; *Angell & A. on Corp.* § 312. As to the mode of making and alleging the request, see *Hazard v. Durant*, 11 R. I. 195; *Brewer v. Boston Theatre*, 104 Mass. 378. A request is not always required. *Mussina v. Goldthwait*, 34 Tex. 125; *Rogers v. Lafayette Agricultural Works*, 52 Ind. 296; *Brewer v. Boston Theatre*, 104 Mass. 378; *Heath v. Erie R. Co.*, 8 Blatch. 347.

⁵ *Lagrange v. State Treasurer*, 24 Mich. 468; *Samuels v. Holladay*, *Woolworth*, 400, *McCahon* (Kan.), 214; *Russell v. Wakefield Water Works Co.*, L. R. 20 Eq. Cas. 474.

tion.¹ A shareholder's bill has been maintained against the directors for fraud or improper conduct in preventing the majority from exercising a proper control over the company's affairs.² One must be, in fact, a stockholder in order to have a *locus standi* in such suits.³ An action at law by a stockholder is not maintainable against directors for losses caused by their default.⁴ The property of the corporation is a trust fund, which, when wrongfully disposed of by the directors or illegally withdrawn by stockholders, may be followed into the hands of parties having notice.⁵

The corporation may maintain an action at law against an officer for a fraudulent issue of certificates for shares in its capital stock.⁶

The right to proceed in equity against the officers of private corporations for breaches of trust belongs to the corporation or to stockholders. The government, while it may pursue remedies for the forfeiture of the charter, or to restrain acts *ultra vires*, has no such interest, as trustee, in the property of the corporation as entitles it to pursue the directors for breaches of trust. This was held in a suit brought by the Attorney-General of the United States under the direction of the act of Congress, March 3, 1873, against the Union Pacific Railroad Company and numerous other parties.⁷

¹ *Manderson v. Com. Bank of Penn.*, 28 Pa. St. 379; *Dodge v. Woolsey*, 18 How. 331; *Ottawa, O., & F. R. V. R. Co. v. Black*, 79 Ill. 262; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Marseilles Land Co. v. Aldrich*, 86 Ill. 504.

² *MacDougall v. Gardiner*, L. R. 20 Eq. Cas. 383.

³ *Phil. & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

⁴ *Craig v. Gregg*, 83 Pt. St. 19; *Allen v. Curtis*, 28 Conn. 456; *Greaves v. Gouge*, 69 N. Y. 154.

⁵ *Goodin v. Cincinnati & W. C. Co.*, 18 Ohio St. 169; *Peterson v. Ill., L., & L.*

Co., 6 Brad. (Ill.) 257; *Clarkson v. Erie & N. S. Dispatch*, 6 Brad. (Ill.) 284. See *ante*, pp. 13, 14, and *post*, pp. 80, 81.

⁶ *Brooklyn Crosstown R. Co. v. Strong*, 75 N. Y. 591.

⁷ *United States v. Union Pacific R. Cos.*, 98 U. S. 569, 8 Am. Law Rev. (Jan. 1874), p. 356. See *People v. Ingersoll*, 58 N. Y. 1; *Attorney-General v. Railroad Cos.*, 35 Wis. 425; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; *Attorney-General v. Great Eastern R. Co.*, L. R. 11 Ch. Div. 449; *Green's Brice's Ultra Vires*, Part IV. ch. v. (2d Am. ed.), pp. 698-714.

CHAPTER III.

THE CREATION OF THE CAPITAL STOCK.

THE capital stock of a corporation is derived from the contributions of individuals who agree to take a certain proportion thereof, designated by shares, and thereby become liable as its stockholders. The agreement to take stock requires the same essential elements as other contracts; to wit, a consideration, the existence and assent of the parties, and mutuality of obligation.¹ The interest in the stock acquired by the subscription is the consideration of the agreement to take shares in it.² The contract, as usually drawn, is several and not joint.³ Being one to be performed in the State creating the corporation, it is to be construed by its law, although made in another State.⁴ The company's right to the subscription is assignable by its own act,⁵ or by operation of law as in a lawful consolidation with another corporation.⁶

Form of the Agreement to take Shares. — The assent to take shares in the stock of a company is ordinarily manifested by the subscription of one's name in its books, or on some paper in the possession of its officers or agents, under an appropriate formula, with the number of shares which the subscriber agrees to take placed opposite to his name. The agreement may be made in other modes, where no particular one is prescribed by the

¹ *Melvin v. Hoitt*, 52 N. H. 61, 67; *Taggart v. Western Md. R. Co.*, 24 Md. 563.

² *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Lake Ontario, A., & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. 157, 165; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435, 453; *Kennebec & P. R. Co. v. Palmer*, 34 Me. 386; *St. Paul, S., & T. F. R. Co. v. Robbins*, 23 Minn. 439. Whether an agreement is a subscription for, or a purchase of stock, see *Ottawa,*

O., & *F. R. V. R. Co. v. Black*, 79 Ill. 262.

³ *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137; *Whittlesey v. Frantz*, 74 N. Y. 456.

⁴ *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244.

⁵ *Morris v. Cheney*, 51 Ill. 451; *Downie v. Hoover*, 12 Wis. 174; *Smith v. Hollett*, 34 Ind. 519.

⁶ *Hanna v. Cincinnati & Ft. W. R. Co.*, 20 Ind. 30; *Swartwout v. Mich. A. L. R. Co.*, 24 Mich. 389, 404.

charter, provided the one adopted is such as to bind both parties.¹ It may, like other agreements, be made by letter.² If the incorporating act expressly or impliedly prescribes an exclusive mode of making the agreement, it must be followed in order to hold a subscriber.³ Thus, under the general plank-road law,⁴ and the general railroad law of New York,⁵ subscriptions are alone binding when made to the articles of association. There may, however, be several copies of the same set of articles, each signed by a different list of subscribers.⁶ A written subscription is the usual mode prescribed by statute.⁷ The subscriber will be bound, although his assent is not in the form prescribed by statute, if it is supported by an independent consideration and has been accepted by the corporation.⁸ Subscriptions are sometimes made on a paper separate from the corporate books or articles of association, with an express or implied authority to the person holding the paper to transfer them to such books;⁹ and when so transferred, the books have been held original evidence of the subscriptions.¹⁰

Defective Subscriptions. — If the articles are, by reason of blanks, wanting in substantial particulars, as, for instance, the names of

¹ *Fry v. Lexington & B. S. R. Co.*, 2 Met. (Ky.) 314; *Pittsburg & C. R. Co. v. Stewart*, 41 Pa. St. 54.

² *Household Fire Ins. Co. v. Grant*, L. R. 4 Exch. Div. 216 (overruling *British & A. Tel. Co. v. Colson*, L. R. 6 Exch. 108).

³ *Charlotte & S. C. R. Co. v. Blakely*, 3 Strob. 245; *Carlisle v. Saginaw Valley & St. L. R. Co.*, 27 Mich. 315; *Parker v. Northern Cent. M. R. Co.*, 33 Mich. 23; *Monterey & S. V. R. Co. v. Hildreth*, 53 Cal. 123.

⁴ *Poughkeepsie & S. P. Plank Road Co. v. Griffin*, 24 N. Y. 150.

⁵ *Troy & B. R. Co. v. Tibbitts*, 18 Barb. 297; *Troy & B. R. Co. v. Warren*, 18 Barb. 310. But see *Peninsular R. Co. v. Duncan*, 28 Mich. 130.

⁶ *Lake Ontario, A., & N. Y. R. Co. v. Mason*, 16 N. Y. 451.

⁷ *Pittsburg & S. R. Co. v. Gazzam*, 32 Pa. St. 340; *Vreeland v. New Jersey Stone Co.*, 2 Stewart (N. J.), 188. See *Hays v. Pittsburg & S. R. Co.*, 38 Pa. St. 81.

⁸ *Carlisle v. Saginaw Valley & St. L. R. Co.*, 27 Mich. 315; *Parker v. Northern Cent. M. R. Co.*, 33 Mich. 23; *Northern Cent. M. R. Co. v. Eslow*, 40 Mich. 222.

⁹ *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328; *Brownlee v. Ohio, I., & I. R. Co.*, 18 Ind. 68; *New Hamp. Cent. R. Co. v. Johnson*, 30 N. H. 390; *Greenville & C. R. Co. v. Smith*, 6 Rich. 91; *Lane v. Brainerd*, 30 Conn. 565; *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. 157; *Stuart v. Valley R. Co.*, 32 Gratt. 146. An agreement to subscribe when the books shall be opened does not make a person a subscriber and liable for calls, though he may be liable in damages for breach of his agreement. *Thrasher v. Pike County R. Co.*, 25 Ill. 393. A person may become a stockholder without any subscription, by simply paying for and receiving his stock. *Clark v. Farrington*, 11 Wis. 306, 326.

¹⁰ *Iowa & M. R. Co. v. Perkins*, 28 Iowa, 281; *Stuart v. Valley R. Co.*, 32 Gratt. 146.

directors, subscribers are not bound, unless an authority is given to fill the blanks, or a subsequent insertion is ratified.¹ Where a person subscribes a blank paper with an oral agreement that it is to take effect as a subscription only on certain conditions, these must be complied with in order to hold him.² An irregular or defective subscription may be made valid by the subscriber's acting as stockholder or director.³ A municipal subscription may be made by a mere vote or resolution, without a formal signature to any book or paper, and as soon as accepted is binding on the municipality.⁴

Subscriptions by Agents.—A person in whose behalf an unauthorized subscription has been made may ratify it. His ratification will be implied from his acting as stockholder, or from his acquiescence accompanied with knowledge.⁵ The corporation may accept or reject subscriptions obtained by persons who were not authorized to act for it;⁶ and parol evidence is admissible to show an acceptance.⁷ But subscriptions taken by unauthorized persons are, until accepted by the corporation, subject to revocation by subscribers.⁸ An agent to procure subscriptions has no implied authority to assent to a cancellation of them.⁹ The substitution of one subscriber for another can only be consummated by consent of parties and an entry on the books.¹⁰ A person who subscribes for another without authority becomes himself liable as a subscriber.¹¹

¹ *Dutchess & C. C. R. Co. v. Mabbett*, 58 N. Y. 397; *Reed v. Richmond St. R. Co.*, 50 Ind. 342.

² *Bucher v. Dillsburg & M. R. Co.*, 76 Pa. St. 306; *Tonica & P. R. Co. v. Stein*, 21 Ill. 96.

³ *St. Charles Man. Co. v. Britton*, 2 Mo. App. 290; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435; *Lane v. Brainerd*, 30 Conn. 565.

⁴ *Nugent v. Supervisors*, 19 Wall. 241; *Clarke County Court v. Paris, W., & K. R. Turnp. Co.*, 11 B. Monr. 143; *State v. Lime*, 23 Minn. 521.

⁵ *Penobscot R. Co. v. Dummer*, 40 Me. 172; *Phil. W., & B. R. Co. v. Cowell*, 28 Pa. St. 329; *McCully v. Pittsburg & C. R. Co.*, 32 Pa. St. 25; *Pittsburg & S. R. Co. v. Gazzam*, 32 Pa. St. 340. A mere declaration by a party to strangers, that he has a certain amount of stock, is not a

ratification. *Rutland & B. R. Co. v. Lincoln*, 29 Vt. 206.

⁶ *Walker v. Mobile & O. R. Co.*, 34 Miss. 245; *Melvin v. Hoitt*, 52 N. H. 61; *Mobile & O. R. Co. v. Yandal*, 5 Sneed, 294; *Taggart v. Western Md. R. Co.*, 24 Md. 563.

⁷ *Mansfield, C., & L. M. R. Co. v. Brown*, 26 Ohio St. 223.

⁸ *Lowe v. E. & K. R. Co.*, 1 Head, 659. See *Scarlett v. Academy of Music*, 46 Md. 132, 153.

⁹ *Lowe v. E. & K. R. Co.*, 1 Head, 659; *Custar v. Titusville Gas & W. Co.*, 63 Pa. St. 381. An agent to obtain subscriptions cannot cancel his own. *Cheraw & C. R. Co. v. White*, 10 S. C. 155.

¹⁰ *Ryder v. Alton & S. R. Co.*, 13 Ill. 516.

¹¹ *State v. Smith*, 48 Vt. 266.

Delivery of the Subscription ; Escrow. — A subscription takes effect when it is actually or constructively received by the company, through its officers or agents. If the subscriber being an officer or agent holds the subscription book or paper as the company's agent, his own subscription is binding on him, even while the book or paper continues in his hands.¹ If a subscriber desires his subscription to remain an escrow, he should deliver it to a third party for that purpose, and not to a person authorized to receive subscriptions for the company.² But a director of the company who is not authorized to receive subscriptions, may hold one as an escrow.³ Parol evidence is admissible to show the conditions on which the paper was delivered.⁴

Subscriptions before the Existence or Organization of the Corporation. — The subscription being a promise, it is a familiar requirement of the common law that there must be a party *in esse* competent to receive it, or it will not bind the maker. No action, therefore, can be maintained by the company against a person who, before it was incorporated, signed with others a paper agreeing to take a certain amount of stock in it, there being no act of his subsequent to the incorporation in affirmance of his former promise.⁵ But when the charter is granted, the corporation comes into existence and acquires the capacity to receive subscriptions to its capital stock, although while it remains unorganized its right to enforce them is suspended.⁶

¹ New Hampshire Cent. R. Co. v. Johnson, 30 N. H. 390; Corwith v. Culver, 69 Ill. 502. See Pittsburg & C. R. Co. v. Plummer, 37 Pa. St. 413.

² Wight v. Shelby R. Co., 16 B. Monr. 4; Cass v. Pittsburg, V., & C. R. Co., 80 Pa. St. 31.

³ Ottawa, O., & F. R. V. R. Co. v. Hall, 1 Brad. (Ill.) 612.

⁴ Id.

⁵ Strasburg R. Co. v. Echternacht, 21 Pa. St. 220; Gleaves v. Brick Church Turnp. Co., 1 Sneed, 491; Thrasher v. Pike County R. Co., 25 Ill. 393; Mt. Sterling Coalroad Co. v. Little, 14 Bush, 429; Goff v. Winchester College, 6 Bush, 443; Monterey & S. V. R. Co. v. Hildreth, 53 Cal. 123. But see Peoria & O. R. Co. v. Elting, 17 Ill. 429.

⁶ Marlborough Branch R. Co. v. Ar-

nold, 9 Gray, 159; Diman v. Providence, W., & B. R. Co., 5 R. I. 130; Danbury & N. R. Co. v. Wilson, 22 Conn. 435, 453; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Lackey v. Richmond & L. Turnp. R. Co., 17 B. Monr. 43; Selma & T. R. Co. v. Tipton, 5 Ala. 787; Stoops v. Greensburgh & B. Plank Road Co., 10 Ind. 47; Monterey & S. V. R. Co. v. Hildreth, 53 Cal. 123; Oregon Cent. R. Co. v. Scoggin, 3 Oreg. 161; Low v. Conn. & P. R. R. Co., 45 N. H. 370, 376; Ashuelot Boot & Shoe Co. v. Hoit, 56 N. H. 548. But see Wilmington & M. R. Co. v. Wright, 5 Jones (N. C.), 304; Charlotte & S. C. R. Co. v. Blakely, 3 Strob. 245; Starrett v. Rockland Fire & M. Ins. Co., 65 Me. 374; Stone v. Great Western Oil Co., 41 Ill. 85. The company may take a grant after the charter incorporation,

Several persons may, however, even before a charter has been obtained, *agree with each other* to take and pay for a certain number of shares in the stock of a corporation not yet created, and may designate some one as their common representative to collect and sue for the amounts, or confer a like authority on the corporation itself; and the subscription so drawn may be enforced by the appointed person or by the corporation when it comes into existence.¹ But the legal formation of a corporation for the purpose specified in the subscription is a condition precedent to the subscriber's obligation.²

) Some authorities regard an organization of the corporation as essential to its existence;³ but, if so regarded, a ratification by the subscriber, after such organization, of a subscription which preceded it will make the subscription binding; and such ratification will be implied from the payment of assessments or from acting as stockholder.⁴

In the case of corporations formed under a general law, the recording of articles of association or an official certificate takes the place of a charter.⁵ Such a law may contemplate, as one of the early steps, the creation of a certain amount of capital stock, and impose an obligation on subscribers before such record or issue.⁶ In some States, however, they are not bound until the articles are duly filed.⁷

although prior to organization. *Vermont Mining & Q. Co. v. Windham County Bank*, 44 Vt. 489; *Rathbone v. Tioga Nav. Co.*, 2 W. & S. 74.

¹ *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H. 548. See *People's Ferry v. Balch*, 8 Gray, 303. Some authorities treat as binding subscriptions in contemplation of a corporation to be formed, which may be enforced by the corporation when created. *Tonica & P. R. Co. v. McNeely*, 21 Ill. 71; *Johnston v. Ewing Female University*, 35 Ill. 518; *Dorris v. French*, 6 Thomp. & C. 581; *Hughes v. Antietam Man. Co.*, 34 Md. 316; *Kidwelly Canal Co. v. Raby*, 2 Price (Exch.), 93; *Midland Great Western R. Co. v. Gordon*, 16 M. & W. 804.

² *Dorris v. Sweeney*, 60 N. Y. 463. See *Hughes v. Antietam Man. Co.*, 34 Md. 316.

³ *Starrett v. Rockland Fire & M. Ins. Co.*, 65 Me. 374.

⁴ *Lexington & W. C. R. Co. v. Chandler*, 13 Met. 311; *Kennebec & P. R. Co. v. Palmer*, 34 Me. 366; *Chaffin v. Cummings*, 37 Me. 76; *Penobscot R. Co. v. Dummer*, 40 Me. 172.

⁵ *Ante*, Chap. I. p. 3.

⁶ *Hughes v. Antietam Man. Co.*, 34 Md. 316; *Cross v. Pickneyville Mill Co.*, 17 Ill. 54; *Covington, C. C., & J. Plank Road Co. v. Moore*, 3 Ind. 510; *Anderson v. Newcastle & R. R. Co.*, 12 Ind. 376; *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. 157.

⁷ *Lake Ontario, A., & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *Buffalo & P. R. Co. v. Hatch*, 20 N. Y. 157, 161; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, 299, 6 Hun, 293; *Burt v. Farrar*, 24 Barb. 518; *Erie & N. Y. City R. Co. v. Owen*, 32 Barb. 616; *Garrett v. Dillsburg & M. R. Co.*, 78 Pa. St. 465; *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H. 548; *Rikhoff v. Brown's Rotary S. S. M. Co.*, 68 Ind. 388.

Commissioners with special and limited powers are sometimes appointed by the State to receive contributions to the capital stock, and superintend the proceedings for organization, their functions ending when the organization has been effected. Their powers differ from those of directors, being generally more restricted, particularly as to allowing any conditional subscriptions and payments in other modes than by money.¹ In Pennsylvania, while conditional subscriptions may be received by a corporation, the conditions in subscriptions received by commissioners are void, and the liability of the subscriber is absolute.²

Non-payment of the First Instalment.—The failure of the subscriber to pay a certain per cent, usually five or ten, on the amount subscribed, which the charter or statute requires to be paid at the time of the subscription, has been held in some States essential to the validity of the subscription; and the rule has been considered to be of especial force where subscriptions are received prior to a complete organization of the corporation. The statute is construed as prohibiting a subscription which is not accompanied by the payment in cash, and to make such a payment a condition precedent to the subscriber's right to stock; and the company not being bound to treat the subscription as valid, there is no mutuality of obligation.³ This defence has been treated in other States as unconscionable by enabling a party to take advantage of his own wrong. It is rejected altogether in several States, such payment being held to be a requirement which

¹ Vermont Cent. R. Co. v. Claves, 21 Vt. 30; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; Lane v. Brainerd, 30 Conn. 565; James v. Cincinnati, H., & D. R. Co., 2 Disney, 261; Wellersburg & W. N. Plank Road Co. v. Hoffman, 9 Md. 559; Ellison v. Mobile & O. R. Co., 36 Miss. 572; N. E. R. Co. v. Rodrigues, 10 Rich. 278. The notice of the opening of books may be given by a majority of those authorized by the charter to give it. Penobscot R. Co. v. White, 41 Me. 512.

² Erie & W. Plank Road Co. v. Brown, 25 Pa. St. 156; Phil. & W. C. R. Co. v. Hickman, 28 Pa. St. 318; Bavington v. Pittsburg & S. R. Co., 34 Pa. St. 358; Pittsburg & C. R. Co. v. Stewart, 41 Pa.

St. 54; Bedford R. Co. v. Bowser, 48 Pa. St. 29; Nippenose Man. Co. v. Stadon, 68 Pa. St. 256; Caley v. Phil. & C. County R. Co., 80 Pa. St. 363; Hanover Junction & S. R. Co. v. Haldeman, 82 Pa. St. 36.

³ Jenkins v. Union Turnp. Co., 1 Caines Cas. in Error 86 (overruling 1 Caines, 381); New York & O. M. R. Co. v. Van Horn, 57 N. Y. 473; Hibernia Turnp. Co. v. Henderson, 8 S. & R. 219; Bucher v. Dillsburg & M. R. Co., 76 Pa. St. 306; Taggart v. Western Md. R. Co., 24 Md. 563; Western Md. R. Co. v. Manro, 32 Md. 280; Fiser v. Miss. & T. R. Co., 32 Miss. 359. A statute taking away this defence will not be construed as retrospective. New York & O. M. R. Co. v. Van Horn, 57 N. Y. 473.

the corporation may waive.¹ The defence also, if admitted, is limited to cases where it appears to be the clear intention of the statute that the payment of the cash instalment shall be a condition precedent to the subscriber's liability.² It does not extend to cases where an agreement only, but not a statute, requires the payment at the time of subscription.³

A person who has acted as a stockholder, notwithstanding the non-payment, has been held estopped from setting up the defence;⁴ but a mere statement in the subscription paper that the amount has been paid does not have that effect.⁵ The defence is not available to a subscriber who, being himself a commissioner, and under an official duty to require a cash payment, is not allowed to take advantage of his own default.⁶ So, also, an agent for receiving subscriptions, who failed to pay when he subscribed, but who subsequently, in the settlement of his account for services, charged himself with the amount of the instalment, was held bound by his subscription.⁷

The subscriber has been held bound where he gave a note for the first instalment, which he afterwards paid;⁸ and even the note itself, before payment, has been treated as a sufficient compliance with the statute to make his subscription binding.⁹ The subscriber may pay the instalment by a check, upon which an

¹ *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Goodrich v. Reynolds*, 31 Ill. 490; *Wight v. Shelby R. Co.*, 16 B. Monr. 4; *Southern Life Ins. & T. Co. v. Lanier*, 5 Fla. 110, 152; *Red River R. Co. v. Young*, 6 Rob. (La.) 39; *Vicksburg, S., & T. R. Co. v. McKean*, 12 La. An. 638; *Minneapolis & St. L. R. Co. v. Bassett*, 20 Minn. 535; *Stuart v. Valley R. Co.*, 32 Gratt. 146; *Garrett v. Dillsburg & M. R. Co.*, 78 Pa. St. 465.

² *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333; *Henry v. Vermillion & A. R. Co.*, 17 Ohio, 187; *Mitchell v. Rome R. Co.*, 17 Ga. 574, 588; *Napier v. Poe*, 12 Ga. 170, 184; *Troy & R. R. Co. v. Kerr*, 17 Barb. 581, 601; *Ogdensburgh, R., & C. R. Co. v. Frost*, 21 Barb. 541; *Phil. & W. C. R. Co. v. Hickman*, 28 Pa. St. 318.

³ *Water Valley Man. Co. v. Seaman*, 53 Miss. 655.

⁴ *Clark v. Monongahela Nav. Co.*, 10 Watts, 364; *Erie & W. Plank Road Co.*

v. Brown, 25 Pa. St. 156; *Greenville & C. R. Co. v. Woodsides*, 5 Rich. 145; *Haywood & P. Plank Road Co. v. Bryan*, 6 Jones (N. C.), 82.

⁵ *New York & O. M. R. Co. v. Van Horn*, 57 N. Y. 473.

⁶ *Ryder v. Alton & S. R. Co.*, 13 Ill. 516; *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54, 57; *Grayble v. York & G. Turnp. Co.*, 10 S. & R. 269; *Highland Turnp. Co. v. McKean*, 11 Johns. 98.

⁷ *Beach v. Smith*, 30 N. Y. 116, 28 Barb. 254.

⁸ *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 807; *Klein v. Alton & S. R. Co.*, 13 Ill. 514; *Ogdensburgh, C., & R. R. Co. v. Wolley*, 1 Keyes, 118, 3 Abbott Ct. App. 398.

⁹ *Vermont Cent. R. Co. v. Claves*, 21 Vt. 30; *Greenville & C. R. Co. v. Woodsides*, 5 Rich. 145; *McRae v. Russell*, 12 Ired. 224; *Clark v. Farrington*, 11 Wis. 306; *Blair v. Rutherford*, 31 Tex. 465; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220.

action against him may be maintained.¹ The first instalment, which is required to be paid at the time of the subscription, may be paid in advance.² A subscriber may ratify a payment made in his behalf by an unauthorized person.³ A subscription, invalid for want of payment at the time, is affirmed by a subsequent payment, which may also include other instalments.⁴ The non-payment of the instalment is not a defence to a suit by a creditor of the corporation against a stockholder to enforce a statute liability;⁵ nor does it affect the validity of the charter.⁶

The violation of statute provisions prohibiting the company from beginning the construction of its road until a certain amount has been paid in is not a defence to a suit for assessments.⁷

Full Number of Shares not taken.—The taking up of the entire capital stock as fixed by law is a condition precedent, even though not so expressly declared, to the liability of subscribers to pay assessments for the general purpose of the corporation. The amount may be determined by the charter, or by the action of the corporation or of its directors in pursuance thereof, or by the subscription paper itself; and in each case the whole number of shares must be taken, before subscribers can be held. The rule is founded in the reason that without it a subscriber's proportionate interest and risk in the enterprise would be varied without his consent. He has a right also to insist that the whole amount which was deemed essential to the success of the enterprise should be obtained before it is undertaken.⁸

¹ *Syracuse, P., & O. R. Co. v. Gere*, 4 Hun, 392, 6 Thomp. & C. 636; *People v. Stockton & V. R. Co.*, 45 Cal. 306. See *Crocker v. Crane*, 21 Wend. 211; *Thorp v. Woodhull*, 1 Sandf. Ch. 411.

² *Barrington v. Miss. Cent. R. Co.*, 32 Miss. 370.

³ *Miss. & T. R. Co. v. Harris*, 36 Miss. 17.

⁴ *Beach v. Smith*, 30 N. Y. 116, 28 Barb. 254; *Black River & U. R. Co. v. Clarke*, 25 N. Y. 208; *Fiser v. Miss. & T. R. Co.*, 32 Miss. 359.

⁵ *Eaton v. Aspinwall*, 19 N. Y. 119.

⁶ *Commonwealth v. West Chester R. Co.*, 3 Grant, 200.

⁷ *Agricultural Branch R. Co. v. Winchester*, 13 Allen, 29. The ten per cent on the capital required by the New York

act may be computed on the aggregate amount paid in, even though it has not been paid on some of the shares. *Lake Ontario, A., & N. Y. R. Co. v. Mason*, 16 N. Y. 451.

⁸ *Salem Mill Dam Co. v. Ropes*, 6 Pick. 23, 9 Pick. 187; *Central Turnp. Co. v. Valentine*, 10 Pick. 142; *Cabot & W. S. Bridge Co. v. Chapin*, 6 Cush. 50; *Worcester & N. R. Co. v. Hinds*, 8 Cush. 110; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 423; *Stoneham Branch R. Co. v. Gould*, 2 Gray, 277; *Nutter v. Lexington & W. C. R. Co.*, 6 Gray, 85; *Troy & G. R. Co. v. Newton*, 8 Gray, 596; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244; *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Penobscot R. Co. v. Dummer*, 40 Me. 172; *Somerset & K. R. Co. v. Cushing*,

If the number of shares is not fixed by the charter, the presumption is, that it is to be fixed by the stockholders or directors.¹ Where, under the act, the directors are to determine the number from time to time, no assessment can be laid till it has been determined.² The directors may determine it by a direct vote, fixing the number; or impliedly, by a vote to close the books when a certain number of shares have been taken.³

But if the taking up of the entire capital stock appears, by the true construction of existing laws or by the agreement, not intended to be a condition precedent to the right of the corporation to recover the calls, the subscriber will be liable, although the full amount has not been taken.⁴ So, also, he will be liable where the statute, while imposing a maximum and minimum

45 Me. 524; *Somerset R. Co. v. Clarke*, 61 Me. 379; *Littleton Man. Co. v. Parker*, 14 N. H. 543; *New Hamp. Cent. R. Co. v. Johnson*, 30 N. H. 390; *Contoocook V. R. Co. v. Barker*, 32 N. H. 363; *Shurtz v. Schoolcraft & T. R. R. Co.*, 9 Mich. 269; *Monroe v. Ft. Wayne, J., & S. R. Co.*, 28 Mich. 272; *Allman v. Havana, R., & E. R. Co.*, 88 Ill. 521; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Hughes v. Antietam Man. Co.*, 34 Md. 316; *Baile v. Calvert College Educational Soc.*, 47 Md. 117; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *Selma, M., & M. R. Co. v. Anderson*, 51 Miss. 829; *Peoria & R. I. R. Co. v. Preston*, 35 Iowa, 115; *Norwich & L. Nav. Co. v. Theobald, Moody & M.* 151. An express statute requirement that a certain amount shall be subscribed before the corporation can act must be complied with. *Fry v. Lexington & B. S. R. Co.*, 2 Met. (Ky.) 314. See *Lail v. Mt. Sterling Coal Road Co.*, 13 Bush, 32. The legislature, it has been held, cannot, by a reduction of the amount fixed by the charter, make a previous subscription binding which was invalid by the reason of the full amount so fixed not having been taken. *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571.

¹ *Somerset & K. R. Co. v. Cushing*, 45 Me. 524; *Somerset R. Co. v. Clarke*, 61 Me. 379; *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445. In *Bucksport & B. R. Co. v. Buck*, 65 Me. 536, 68 Me. 81, a distinction is taken between an action on the contract of subscription and a proceeding for forfeiture, — holding it not necessary to fix

the amount of the capital stock in order to maintain the action on the contract; but the distinction is not justified by the authorities.

² *Worcester & N. R. Co. v. Hinds*, 8 Cush. 110; *Troy & G. R. Co. v. Newton*, 8 Gray, 596.

³ *Lexington & W. C. R. Co. v. Chandler*, 13 Met. 311; *Troy & G. R. Co. v. Newton*, 8 Gray, 596, 599; *Bucksport & B. R. Co. v. Buck*, 65 Me. 536, 68 Me. 81.

⁴ *Kennebec & P. R. Co. v. Jarvis*, 34 Me. 360; *York & C. R. Co. v. Pratt*, 40 Me. 447; *Somerset & K. R. Co. v. Cushing*, 45 Me. 524, 532; *Lexington & W. C. R. Co. v. Chandler*, 13 Met. 311; *Nutter v. Lexington & W. C. R. Co.*, 6 Gray, 85; *Boston, B., & G. R. Co. v. Wellington*, 113 Mass. 79; *Warwick R. Co. v. Cady*, 11 R. I. 131; *Hunt v. Kansas & M. Bridge Co.*, 11 Kan. 412; *Jewett v. Valley R. Co.*, 34 Ohio St. 601; *Hoagland v. Cincinnati & Ft. W. R. Co.*, 18 Ind. 452; *Fox v. Allensville, C., S., & V. Turnp. Co.*, 46 Ind. 31; *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. 157; *Rensselaer & W. Plank Road Co. v. Wetzel*, 21 Barb. 56; *Lail v. Mt. Sterling Coal Road Co.*, 13 Bush, 32; *Perkins v. Sanders*, 56 Miss. 733; *Willamette Freighting Co. v. Stannus*, 4 Oreg. 261; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Waterford, W., W., & D. R. Co. v. Dalbiac*, 6 Exch. 443. See *Minor v. Mechanics' Bank*, 1 Peters, 46. It is not a defence to a suit against a subscriber that neither the charter nor any existing law fixes the number or par value of shares. *Kirksey v. Florida & G. Plank Road Co.*, 7 Fla. 23.

limit, neither fixes the entire amount nor requires the corporation to fix it.¹ Where the act fixes a maximum and minimum capital, and authorizes assessments as soon as the latter is reached, the company can make assessments as soon as the minimum capital has been subscribed, without first determining the ultimate capital.²

The rule requiring the full number to be taken does not apply where stockholders have the privilege of subscribing for a certain number of shares in new stock before it is offered to the public; and they are liable on their subscriptions, although the whole number is not issued.³ The agreement may also be so drawn as to bind subscribers, where no action has been taken to fix the amount of the capital stock.⁴

A statute requiring a certain amount to be subscribed before the work of construction begins has been construed as not prohibiting assessments prior to the subscription of that amount.⁵ If a fixed amount is not required by the charter or the agreement, the subscriber is liable, although the company has not fixed the amount.⁶

A subscriber may be estopped from setting up this defence by co-operating in acts of the company which cannot properly be done except on the assumption that the subscribers intend to proceed with the enterprise before the stock is fully taken up.⁷ But he is not estopped by the payment of instalments, without proof of his knowledge of the defect at the time of such payment.⁸ Nor does he waive his right by a payment with knowledge that some of the subscriptions which are a part of the full amount are invalid, where other material facts are misrepresented to him.⁹

¹ *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244.

² *White Mts. R. Co. v. Eastman*, 34 N. H. 124. A special subscription in aid of construction is binding, although the full amount is not taken. *Iowa & M. R. Co. v. Perkins*, 28 Iowa, 281.

³ *Nutter v. Lexington & W. C. R. Co.*, 6 Gray, 85.

⁴ *Bucksport & B. R. Co. v. Buck*, 65 Me. 536, 68 Me. 81.

⁵ *Penobscot R. Co. v. White*, 41 Me. 512.

⁶ *City Hotel of Worcester v. Dickinson*, 6 Gray, 586.

⁷ *Cabot & W. S. Bridge v. Chapin*, 6

Cush. 50, 53; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 423; *New Hamp. Cent. R. Co. v. Johnson*, 30 N. H. 407; *Clarke v. Thomas*, 34 Ohio St. 46; *Dayton & C. R. Co. v. Hatch*, 1 Disney, 84; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29. But see *Old Town & L. R. Co. v. Veazie*, 39 Me. 571, where it is held that, the action of the corporation being in violation of law, the subscriber cannot waive the objection.

⁸ *Somerset & K. R. Co. v. Cushing*, 45 Me. 524; *Old Town & L. R. Co. v. Veazie*, 39 Me. 571; *Livesey v. Omaha Hotel*, 5 Neb. 50.

⁹ *Ridgefield & N. Y. R. Co. v. Brush*,

The subscriptions, to the amount required by the charter or agreement, must be *bona fide* and binding on the subscribers.¹ They should be made by persons apparently responsible,² though their insolvency subsequently occurring or even existing at the time will not, where the subscription is taken in good faith, exclude it from the count.³ The subscription in order to be counted must not be on conditions which have not been performed or waived,⁴ or be payable in the depreciated stock of another corporation,⁵ or be made by one person for another without authority,⁶ or be of a nominal and fictitious character.⁷ They must not be accompanied by conditions and privileges peculiar to some and not common to all.⁸ Those of contractors are to be included, if they are bound like other subscribers; but not otherwise.⁹ The subscription of the party sued is to be counted as a part of the required amount.¹⁰ If by the agreement or by statute the directors are to determine whether the amount has been obtained, the subscriber is bound by their decision made in good faith.¹¹

The condition, that the full amount of the capital stock shall be subscribed, may be waived by the subscriber.¹² An express agreement that the subscription shall be binding upon a certain

43 Conn. 86; *Morris & B. Co. v. Nathan*, 2 Hall (N. Y.), 239.

¹ *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185; *Monadnock R. Co. v. Felt*, 52 N. H. 379.

² *Penobscot R. Co. v. Dummer*, 40 Me. 172; *Penobscot R. Co. v. White*, 41 Me. 512; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; *Phillips v. Covington & C. Bridge Co.*, 2 Met. (Ky.) 219.

³ *Salem Mill Dam Co. v. Ropes*, 9 Pick. 187, 6 Pick. 23; *Penobscot R. Co. v. Dummer*, 40 Me. 172.

⁴ *Central Turnp. Co. v. Valentine*, 10 Pick. 142; *Troy & G. R. Co. v. Newton*, 8 Gray, 596, 1 Gray, 544; *Boston, B. & G. R. Co. v. Wellington*, 113 Mass. 79, 86; *Oskaloosa Agricultural Works v. Parkhurst*, 6 Northwest. Rep. 235.

⁵ *Cabot & W. S. Bridge v. Chapin*, 6 Cush. 50.

⁶ *Salem Mill Dam Co. v. Ropes*, 9 Pick. 187, 6 Pick. 23.

⁷ *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240.

⁸ *New York Exchange Co. v. De Wolf*,

31 N. Y. 273; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451.

⁹ *Phillips v. Covington & C. Bridge Co.*, 2 Met. (Ky.) 219; *New York, H., & N. R. Co. v. Hunt*, 39 Conn. 75; *Ridgefield & N. Y. R. Co. v. Brush*, 43 Conn. 86; *Troy & G. R. Co. v. Newton*, 8 Gray, 596; *Boston, B. & G. R. Co. v. Wellington*, 113 Mass. 79.

¹⁰ *Scarlett v. Academy of Music*, 46 Md. 132; *Montpelier & W. R. R. Co. v. Langdon*, 45 Vt. 137, 46 Vt. 284.

¹¹ *Cass v. Pittsburg, V., & C. R. Co.*, 80 Pa. St. 31; *Conn. & P. R. R. Co. v. Bailey*, 24 Vt. 465; *Penobscot R. Co. v. White*, 41 Me. 512; *Morris Canal & B. Co. v. Nathan*, 2 Hall (N. Y.), 239. See *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185.

¹² *Hanover Junction & S. R. Co. v. Halde- man*, 82 Pa. St. 36; *Wilmington & R. R. Co. v. Robeson*, 5 Ired. 391; *Montpelier & W. R. R. Co. v. Langdon*, 45 Vt. 137, 46 Vt. 284; *May v. Memphis Branch R. Co.*, 48 Ga. 109; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *Livesey v. Omaha Hotel*, 5 Neb. 50.

amount less than the full amount being subscribed is such a waiver.¹ But a subscriber's attendance at corporate meetings, even one at which an assessment was voted, where he does not appear to have taken a part in the meeting, is not a waiver.²

Conditions in General. — Conditions contained in a subscription are binding on the corporation, and, when not performed, are a defence to a suit against a subscriber.³ Thus the company, in order to maintain an action for calls, must prove the substantial performance of a condition requiring that a certain amount, or an amount sufficient to complete the enterprise or to carry it to a certain point, has been subscribed.⁴ The subscriber is entitled before suit to notice that the condition has been performed.⁵ If the agreement submits the question of the performance to the decision of the directors, their decision, made in good faith, is conclusive.⁶ A subscription upon a condition is not binding on the subscriber until it is accepted by the company.⁷ A reserved right to withdraw a subscription must be exercised seasonably, or a waiver will be implied.⁸

The written condition, in order to be a part of the subscription, must be inserted at the time of signing and not subsequently, except with the consent of parties.⁹ If contained in a separate paper executed at the same time with the subscription, it is valid, unless it involves a fraud on other subscribers.¹⁰ A memorandum added to the subscription is presumed to have been made at the time.¹¹ Parol evidence is admissible to show that a subscrip-

¹ *Emmitt v. Springfield, J., & P. R. Co.*, 31 Ohio St. 23; *Bucksport & B. R. Co. v. Buck*, 65 Me. 536, 68 Me. 81.

² *Ridgefield & N. Y. R. Co. v. Reynolds*, 46 Conn. 375.

³ *Burke v. Smith*, 16 Wall. 390; *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561.

⁴ *People's Ferry Co. v. Balch*, 8 Gray, 303; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Bucksport & B. R. Co. v. Buck*, 65 Me. 536, 68 Me. 81; *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185; *Santa Cruz R. Co. v. Schwartz*, 53 Cal. 106; *Phil. & W. C. R. Co. v. Hickman*, 28 Pa. St. 318; *Cass v. Pittsburg, V., & C. R. Co.*, 80 Pa. St. 31; *Hanover Junction & S. R. Co. v. Haldeman*, 82 Pa. St. 36; *Ridgefield & N. Y. R. Co. v. Reynolds*, 46 Conn. 375; *Monadnock R. Co. v. Felt*, 52 N. H. 379;

Chase v. Sycamore & C. R. Co., 38 Ill. 215; *People v. Holden*, 82 Ill. 93; *Morris Canal & B. Co. v. Nathan*, 2 Hall (N. Y.), 289; *Union Hotel Co. v. Hersee*, 15 Hun, 371.

⁵ *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215. But see *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499.

⁶ *Cass v. Pittsburg, V., & C. R. Co.*, 80 Pa. St. 31.

⁷ *Junction R. Co. v. Reeve*, 15 Ind. 236.

⁸ *Wilmington & R. R. Co. v. Robeson*, 5 Ired. 391.

⁹ *New Hamp. Cent. R. Co. v. Johnson*, 30 N. H. 390.

¹⁰ *White Mts. R. Co. v. Eastman*, 34 N. H. 124.

¹¹ *Robinson v. Pittsburg & C. R. Co.*, 32 Pa. St. 334.

tion on an independent paper was to be annexed to the books, only on compliance with certain conditions.¹

Waiver of Condition. — A condition which is inserted for the benefit of the subscriber may be waived by him.² Thus, the conveyance by the subscriber of land to the company which was the consideration of the stock, and the acceptance of a certificate thereof, is a waiver of the condition.³ A waiver may, where the intention to waive appears from the transaction, be implied from the subscriber's giving a promissory note for the amount of his subscription,⁴ but it will not ordinarily be implied from mere silence.⁵ The condition may be waived or qualified by another clause of the agreement which is inconsistent with it.⁶

Parol Agreements and Representations. — By a familiar rule governing contracts, parol agreements are merged in a written contract. Even agreements in writing not contained in the subscription for stock, which are made with a part of the subscribers, and concealed from the rest, cannot vary the contract, which is common to all. Parol representations as to the character of the enterprise, making it more attractive to particular subscribers, cannot vary the written subscription; and private arrangements securing special privileges to particular subscribers, or relieving them altogether of liability, are a fraud on other subscribers who are not admitted to the privilege or exemption. Therefore, such representations and arrangements are not a defence in a suit against a subscriber to or with whom they were made, and, having no legal effect upon his subscriptions, cannot be set up as a defence by other subscribers.⁷

¹ *Tonica & P. R. Co v. Stein*, 21 Ill. 98; *Bucher v. Dillsburg & M. R. Co.*, 76 Pa. St. 306. As to evidence admissible where the description of the name is defective or uncertain, see *Monadnock R. Co. v. Felt*, 52 N. H. 379; *Scarlett v. Academy of Music*, 46 Md. 132; *Angell & A. on Corp.* § 647.

² *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225; *Lane v. Brainard*, 30 Conn. 565, 579; *ante*, p. 55.

³ *Parks v. Evansville, I., & C. S. L. R. Co.*, 23 Ind. 567.

⁴ *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225; *O'Donald v. Evansville, I., & C. S. L. R. Co.*, 14 Ind. 259;

Taylor v. Fletcher, 15 Ind. 80; *Evansville, I., & C. S. L. R. Co. v. Dunn*, 17 Ind. 603; *Parker v. Thomas*, 19 Ind. 213; *Henderson & N. R. Co. v. Moss*, 2 Duvall, 242.

⁵ *Burlington & M. R. R. Co. v. Boestler*, 15 Iowa, 555; *Bucksport & B. R. Co. v. Brewer*, 67 Me. 295.

⁶ *Woonsocket Union R. Co. v. Sherman*, 8 R. I. 564.

⁷ *Conn. & P. R. R. Co. v. Bailey*, 24 Vt. 465; *Blodgett v. Morrill*, 20 Vt. 509; *Kennebec & B. R. Co. v. Waters*, 34 Me. 369; *White Mts. R. Co. v. Eastman*, 34 N. H. 124; *Ridgefield & N. Y. R. Co. v. Brush*, 43 Conn. 86, 99; *Tuckerman v. Brown*, 33

It is, therefore, no defence to an action to recover assessments that the subscriber has been misled by the parol statements or agreements of persons assuming to act for the company as to the location to be adopted,¹ the time and mode of payment,² the resources of the company,³ the value or cost of the road and franchise,⁴ or the place where, or particular purpose for which the funds are to be expended,⁵ or as to the action of another corporation involving a question of corporate power,⁶ or as to the legal effect of the agreement.⁷ Still more, it is immaterial what was the belief and expectation of a subscriber as to the character

N. Y. 297; *Syracuse, P., & O. R. Co. v. Gere*, 4 Hun, 392, 6 Thomp. & C. 636; *Jones v. Milton & R. Turnp. Co.*, 7 Ind. 547; *Cincinnati, U., & Ft. W. R. Co. v. Pearce*, 28 Ind. 502; *Fox v. Allensville, C. S., & V. Turnp. Co.*, 46 Ind. 31; *Robinson v. Pittsburg & C. R. Co.*, 32 Pa. St. 334; *Custar v. Titusville Gas & W. Co.*, 63 Pa. St. 381; *Cass v. Pittsburg V. & C. R. Co.*, 80 Pa. St. 31; *Miller v. Hanover Junct. & S. R. Co.*, 87 Pa. St. 95; *McCarty v. Selinsgrove & N. B. R. Co.*, 87 Pa. St. 332; *Corwith v. Culver*, 69 Ill. 502; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; *McRae v. Atlantic & N. C. R. Co.*, 5 Jones Eq. 395; *Henry v. Vermillion & A. R. Co.*, 17 Ohio, 187; *Noble v. Callender*, 20 Ohio St. 199; *Jewett v. Valley R. Co.*, 34 Ohio St. 601; *Jack v. Naber*, 15 Iowa, 450; *Downie v. White*, 12 Wis. 176; *Swartwout v. Mich. A. L. R. Co.*, 24 Mich. 389; *Martin v. Pensacola & G. R. Co.*, 8 Fla. 370; *Johnson v. Pensacola & G. R. Co.*, 9 Fla. 299; *Cunningham v. Edgefield & K. R. Co.*, 2 Head, 23; *Sanger v. Upton*, 91 U. S. 56; *Upton v. Hansbrough*, 3 Biss. 417. But see *Jewett v. Lawrenceburgh & U. M. R. Co.*, 10 Ind. 539; *Conn. & P. R. Co. v. Baxter*, 32 Vt. 805; *Swatara R. Co. v. Brune*, 6 Gill, 41.

¹ *Wight v. Shelby R. Co.*, 16 B. Monr. 4; *Railsback v. Liberty & A. Turnp. Co.*, 2 Ind. 656; *Johnson v. Crawfordsville R. Co.*, 11 Ind. 280; *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404; *McAllister v. Indianapolis & C. R. Co.*, 15 Ind. 11; *Fox v. Allensville, C. S., & V. Turnp. Co.*, 46 Ind. 31; *Miller v. Wild Cat Gravel Road Co.*, 57 Ind. 241; *North Carolina R. Co. v. Leach*, 4 Jones (N. C.), 340; *Scarlett v. Academy of Music*, 46

Md. 132; *Gelpcke v. Blake*, 15 Iowa, 387, 19 Iowa, 263; *First National Bank v. Hurford*, 29 Iowa, 579; *Miss., O., & R. R. Co. v. Cross*, 20 Ark. 443; *Ellison v. Mobile & O. R. Co.*, 36 Miss. 572; *East Tenn. & V. R. Co. v. Gammon*, 5 Sneed, 567; *McCarty v. Selinsgrove & N. B. R. Co.*, 87 Pa. St. 332; *Dill v. Wabash Valley R. Co.*, 21 Ill. 91.

² *Thornburgh v. Newcastle & D. R. Co.*, 14 Ind. 499; *Miller v. Wild Cat Gravel Road Co.*, 57 Ind. 241; *Thigpen v. Miss. Cent. R. Co.*, 32 Miss. 347; *Upton v. Tribilcock*, 91 U. S. 45; *Custar v. Titusville Gas & W. Co.*, 63 Pa. St. 381; *Cass v. Pittsburg, V., & C. R. Co.*, 80 Pa. St. 31; *Swartwout v. Mich. A. L. R. Co.*, 24 Mich. 389.

³ *Hardy v. Merriweather*, 14 Ind. 203; *Bish v. Bradford*, 17 Ind. 490; *Brownlee v. Ohio, I., & I. R. Co.*, 18 Ind. 68; *Walker v. Mobile & O. R. Co.*, 34 Miss. 245.

⁴ *Vawter v. Ohio & M. R. Co.*, 14 Ind. 174; *Crossman v. Penrose Ferry Bridge Co.*, 26 Pa. St. 69; *Cass v. Pittsburg, V., & C. R. Co.*, 80 Pa. St. 31.

⁵ *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491. See *Atlanta & W. P. R. Co. v. Hodnett*, 36 Ga. 669; *Milwaukie & I. R. Co. v. Field*, 12 Wis. 340.

⁶ *Johnson v. Crawfordsville R. Co.*, 11 Ind. 280.

⁷ *Clem v. Newcastle & D. R. Co.*, 9 Ind. 488; *New Albany & S. R. Co. v. Fields*, 10 Ind. 187; *Greenville & C. R. Co. v. Smith*, 6 Rich. 91; *N. E. R. Co. v. Rodrigues*, 10 Rich. 278; *Vicksburg, S., & T. R. Co. v. McKean*, 12 La. An. 638; *Upton v. Tribilcock*, 91 U. S. 45; *Oregon Cent. R. Co. v. Scoggin*, 3 Oreg. 161.

and success of the enterprise, or his motives in engaging in it, or the circumstances under which he signed.¹

Conditions contained in agreements between subscribers in advance of an organization of the corporation will not affect the subscription.²

Equity will not reform the contract of subscription by inserting a condition, except on proof that the parties intended at the time of executing it to insert it, and that it was omitted by fraud, accident, or mistake of fact.³ The mistake must have been that of both parties, not of one only. Thus, relief was refused to a person who claimed that he intended to subscribe for only half the amount for which he had in fact subscribed, where it appeared that the subscription was in accordance with the understanding of the company.⁴

Subscriptions Conditional upon the Location. — An agreement is not unfrequently signed by persons interested in a particular locality, by which they promise to take stock in a railroad company, provided a particular route is adopted by it. Such conditional subscriptions have been sustained, when not expressly prohibited, and not in conflict with public policy. The persons subscribing to them are not stockholders or liable to assessments until the company has performed the condition upon which the undertaking depends; and when that is done, they become stockholders by force of the agreement, and the subscription becomes absolute.⁵

¹ *Lackey v. Richmond & L. Turnp. Co.*, 17 B. Monr. 43; *Fry v. Lexington & B. S. R. Co.*, 2 Met. (Ky.) 314; *Penobscot R. Co. v. White*, 41 Me. 512; *Banet v. Alton & S. R. Co.*, 13 Ill. 504, 509; *Irvin v. Turnpike Co.*, 2 Penrose & W. 466.

² *White Hall & P. R. Co. v. Myers*, 16 Abbott Pr. n. s. 34.

³ *Gelpcke v. Blake*, 15 Iowa, 387, 19 Iowa, 263; *Leavitt v. Palmer*, 3 N. Y. 19. See *Andrew v. Spurr*, 8 Allen, 412.

⁴ *Diman v. Providence, W., & B. R. Co.*, 5 R. I. 130. There was also in this case negligence in notifying the corporation of the mistake.

⁵ *McMillan v. Maysville & L. R. Co.*, 15 B. Monr. 218; *Henderson & N. R. Co. v. Leavell*, 16 B. Monr. 358; *Chapman v. Mad River & L. E. R. Co.*, 6 Ohio St. 119;

Trott v. Sarchett, 10 Ohio St. 241; *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225; *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328; *Mansfield, C., & L. M. R. Co. v. Brown*, 26 Ohio St. 223; *Mansfield, C., & L. M. R. Co. v. Stout*, 26 Ohio St. 241; *Fisher v. Evansville & C. R. Co.*, 7 Ind. 407; *Evansville, I., & C. S. R. Co. v. Shearer*, 10 Ind. 244; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499; *Parker v. Thomas*, 19 Ind. 213; *Parks v. Evansville, I., & C. S. L. R. Co.*, 23 Ind. 567; *Cumberland Valley R. Co. v. Baab*, 9 Watts, 458; *Rhey v. Ebensburg & S. Plank Road Co.*, 27 Pa. St. 261; *Caley v. Phil. & C. County R. Co.*, 80 Pa. St. 363; *Martin v. Pensacola & G. R. Co.*, 8 Fla. 370; *Burlington & M. R. Co. v. Boestler*, 15 Iowa, 555; *Des Moines Valley R. Co. v. Graff*, 27 Iowa, 99; *First National Bank*

Personal agreements in the form of a note or subscription or a bond to convey land, by persons who may or may not become stockholders, to pay a certain sum on the road being constructed or laid out on a certain route, are binding; and the performance of the condition is a valid consideration for the agreement.¹

In New York, such subscriptions, conditioned upon the adoption of a certain route, have been held void as against public policy, for the reason that they tend to defraud those who subscribe absolutely, and to induce a location which will subserve private interests to the public detriment.² The subscriber's agreement, unless the company agrees at the time to adopt the route, is considered to lack mutuality and a consideration.³ In Pennsylvania, conditional subscriptions are valid when made to the corporation; but when made to the commissioners before the charter is granted, the condition is void and the subscription absolute.⁴

The subscription agreement may provide as a condition that the road, or a section thereof, shall be put under contract to a certain place,⁵ or within a time named,⁶ or that the construction

v. Hurford, 29 Iowa, 579; *Merrill v. Reaver*, 50 Iowa, 404; *Taggart v. Western Md. R. Co.*, 24 Md. 563, 594; *Racine County Bank v. Ayres*, 12 Wis. 512; *Detroit, L., & L. M. R. Co. v. Starnes*, 38 Mich. 698; *Lowe v. E. & K. R. Co.*, 1 Head, 659; *Nashville & N. W. R. Co. v. Jones*, 2 Cold. 574; *Spartanburg & U. R. Co. v. De Graffenreid*, 12 Rich. 675; *Bucksport & B. R. Co. v. Brewer*, 67 Me. 295. Performance within the time stipulated is essential. *Burlington & M. R. R. Co. v. Boestler*, 15 Iowa, 555; *Freeman v. Matlock*, 67 Ind. 99. Subscriptions may, under statutes, be made for particular sections of the railroad. *Agricultural Branch R. Co. v. Winchester*, 13 Allen, 29.

¹ *Cumberland Valley R. Co. v. Baab*, 9 Watts, 458; *Des Moines Valley R. Co. v. Graff*, 27 Iowa, 99; *Burlington, C., R., & M. R. Co. v. Palmer*, 42 Iowa, 222; *First National Bank v. Hendrie*, 49 Iowa, 402; *Carlisle v. Terre Haute & R. R. Co.*, 6 Ind. 316; *Berryman v. Cincinnati Southern R. Co.*, 14 Bush, 755; *McClure v. Mo. River, F. S., & G. R. Co.*, 9 Kan. 373; *Stevens v. Corbitt*, 33 Mich. 458; *Mich., M., & C. R. Co. v. Bacon*, 33 Mich. 466; *Rose v. San Antonio & M. G. R. Co.*, 31 Tex. 49.

² *Utica & S. R. Co. v. Brinckerhoff*, 21 Wend. 139; *Macedon & B. Plank Road Co. v. Snediker*, 18 Barb. 317; *Butternutts & O. Turnp. v. North*, 1 Hill, 518; *Fort Edward & Ft. M. Plank Road Co. v. Payne*, 15 N. Y. 583 (overruling 17 Barb. 567). See *Holladay v. Patterson*, 5 Oreg. 177.

³ *Utica & S. R. Co. v. Brinckerhoff*, 21 Wend. 139; *Macedon & B. Plank Road Co. v. Snediker*, 18 Barb. 317. In these cases *Cooke v. Oxley*, 3 Term R. 658, was relied on, a case which is now generally discredited as an authority. See *Boston & M. R. v. Bartlett*, 3 Cush. 224; *L'Amoureux v. Gould*, 7 N. Y. 349; *Conn. & P. R. R. Co. v. Bailey*, 24 Vt. 465, 478.

⁴ *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Nippenose Man. Co. v. Staddon*, 68 Pa. St. 256; *Caley v. Phil. & C. County R. Co.*, 80 Pa. St. 363; *McCarthy v. Selinsgrove & N. B. R. R. Co.*, 87 Pa. St. 332; *Taggart v. Western Md. R. Co.*, 24 Md. 563; *North Carolina R. Co. v. Leach*, 4 Jones, 340.

⁵ *Conn. & P. R. R. Co. v. Baxter*, 32 Vt. 805; *Troy & G. R. Co. v. Newton*, 8 Gray, 596, 1 Gray, 544.

⁶ *Burlington & M. R. R. Co. v. Boestler*, 15 Iowa, 555.

shall be advanced to a certain stage,¹ or that bonds of the corporation shall be delivered to the subscriber,² or that the road shall have a location satisfactory to him.³

Fraud on Subscribers. — Fraud practised by the company on a subscriber which induced his subscription has been held a good defence to suits for calls.⁴ This defence is usually founded in statements known to be false by its official managers, and made by them or by agents in their behalf, concerning the financial condition and earnings of the company, the amount subscribed, or other material facts calculated to tempt subscribers.⁵ They may be made by officers and agents directly to subscribers, or through a prospectus issued by the company to the public for the purpose of obtaining subscriptions.⁶ When made by persons not acting as authorized agents of the company, although officers or stockholders, they do not affect the validity of the subscriptions.⁷

Equity will set aside a contract of subscription when procured by fraud.⁸ The fraud of the company in the sale of its stock entitles the vendee to rescind it and recover the consideration.⁹

¹ *Roberts v. Mobile & O. R. Co.*, 32 Miss. 373; *Taylor v. Fletcher*, 15 Ind. 80.

² *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561.

³ *Bucksport & B. R. Co. v. Brewer*, 67 Me. 295.

⁴ *Kishacoquillas & C. Turnp. Road Co. v. McConaby*, 16 S. & R. 140; *Crossman v. Penrose Ferry Bridge Co.*, 26 Pa. St. 69; *Custar v. Titusville Gas & W. Co.*, 63 Pa. St. 381; *Melendy v. Keen*, 89 Ill. 395; *Cunningham v. Edgefield & K. R. Co.*, 2 Head, 23; *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex. 560; *Occidental Ins. Co. v. Ganzhorn*, 2 Mo. App. 205; *Upton v. Engelhart*, 3 Dill. 496; *Farrar v. Walker*, 3 Dill. 506, note; *Sinnett v. Moles*, 38 Iowa, 25. See *Bradley v. Poole*, 98 Mass. 169; *Mitchell v. Deeds*, 49 Ill. 416.

⁵ *Waldo v. Chicago, S. P., & F. R. Co.*, 14 Wis. 575; *Burhop v. Milwaukie*, 18 Wis. 431; *McClellan v. Scott*, 24 Wis. 81; *Selma, M., & M. R. Co. v. Anderson*, 51 Miss. 829; *Water Valley Man. Co. v. Seaman*, 53 Miss. 655; *Vreeland v. New Jersey Stone Co.*, 2 Stewart (N. J.), 188; *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex. 560; *Davis v. Dumont*, 37 Iowa,

47; *Melendy v. Keen*, 89 Ill. 395; *Nugent v. Cincinnati, H., & I. S. L. R. Co.*, 2 Disney, 302. This last case was a bill in equity to set aside a conveyance of real estate made in payment of the subscription. See *Burnes v. Pennell*, 2 H. L. Cas. 497, 530. Lord Brougham: "You must show that there has been some specific fraudulent conduct on the part of the directors, some grossly fraudulent conduct, which gave rise to the particular contract in question."

⁶ *Central R. Co. of Venezuela v. Kisch*, L. R. 2 H. L. 99; *Heyman v. European Cent. R. Co.*, L. R. 7 Eq. Cas. 154.

⁷ *Fort Wayne & B. Turnp. Co. v. Deam*, 10 Ind. 563; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *White Hall & P. R. Co. v. Myers*, 16 Abbot Pr. n. s. 34; *Penobscot R. Co. v. White*, 41 Me. 512; *Goodrich v. Reynolds*, 31 Ill. 490, 497. See *Atlanta & W. P. R. Co. v. Hodnett*, 36 Ga. 669.

⁸ *Vreeland v. New Jersey Stone Co.*, 2 Stewart (N. J.), 188; *Ross v. Estates Investment Co.*, L. R. 3 Eq. Cas. 122; *Hallows v. Fernie*, L. R. 3 Eq. Cas. 520.

⁹ *McClellan v. Scott*, 24 Wis. 81. See *Atlanta & W. P. R. Co. v. Hodnett*, 36 Ga. 669.

The subscriber cannot defend on the ground of fraud where he did not rely or act on the statement,¹ or it did not result in injury to him,² or where it declared only opinions instead of facts, or where it declared facts of which the subscriber had means of knowledge,³ or where it would not have misled him if he had known the law.⁴ The right to repudiate his subscription on account of fraud must—it being a voidable, and not a void contract—be seasonably exercised,⁵ especially when asserted against the creditors of the company.⁶ The subscriber cannot set up in defence a fraud to which he was in law or fact a party.⁷ It may be added that the contract of subscription being in a sense a mutual or “trilateral” one,—one involving the subscribers in a common interest and risk,—a subscriber ought not to be allowed this defence where his release would be injurious to other innocent subscribers who may be presumed to have taken or retained an interest in the enterprise, relying on his as on other subscriptions.⁸

Construction of Written Conditions.—The construction of written conditions should be reasonable and such as will facilitate the object of the enterprise, and should have regard to a substantial

¹ *Burlington, C., R., & M. R. Co. v. Palmer*, 42 Iowa, 222; *Oregon Cent. R. Co. v. Scoggin*, 3 *Oreg.* 161.

² *Branham v. Record*, 42 *Ind.* 181. See *Water Valley Man. Co. v. Seaman*, 53 *Miss.* 655.

³ *Oregon Cent. R. Co. v. Scoggin*, 3 *Oreg.* 161; *Hughes v. Antietam Man. Co.*, 34 *Md.* 316; *Conybeare v. New Brunswick & C. R. Co.*, 1 *Giff. Ch.* 339, 9 *H. L. Cas.* 711.

⁴ *Selma, M., & M. R. Co. v. Anderson*, 51 *Miss.* 829; *Upton v. Tribilcock*, 91 *U. S.* 45; *Wight v. Shelby R. Co.*, 16 *B. Monr.* 4.

⁵ *Parks v. Evansville, I., & C. S. L. R. Co.*, 23 *Ind.* 567; *Ogilvie v. Knox Ins. Co.*, 22 *How.* 380; *Upton v. Tribilcock*, 91 *U. S.* 45; *Chubb v. Upton*, 95 *U. S.* 665; *Upton v. Engelhart*, 3 *Dill.* 496; *Farrar v. Walker*, 3 *Dill.* 506, note; *Central R. Co. of Venezuela v. Kisch*, *L. R.* 2 *H. L.* 99; *Cunningham v. Edgefield & R. R. Co.*, 2 *Head*, 23.

⁶ *Upton v. Tribilcock*, 91 *U. S.* 45; *Chubb v. Upton*, 95 *U. S.* 665; *Oakes v.*

Turquand, *L. R.* 2 *H. L.* 325; *Tennent v. City of Glasgow Bank*, *L. R.* 4 *App. Cas.* 615; *Houldsworth v. Glasgow Bank*, *L. R.* 5 *App. Cas.* 317; *Stone v. City & County Bank*, *L. R.* 3 *C. P. Div.* 282.

⁷ *Kishacoquillas & C. Turnp. Road Co. v. McConaby*, 16 *S. & R.* 140; *Graff v. Pittsburg & S. R. Co.*, 31 *Pa. St.* 489; *Hays v. Pittsburg & S. R. Co.*, 38 *Pa. St.* 81; *Southern Plank Road Co. v. Hixon*, 5 *Ind.* 165; *Crocker v. Crane*, 21 *Wend.* 211; *Clark v. Farrington*, 11 *Wis.* 306; *White Mts. R. Co. v. Eastman*, 34 *N. H.* 124; *Minor v. Mechanics' Bank*, 1 *Peters*, 46; *Blodgett v. Morrill*, 20 *Vt.* 509.

⁸ *Graff v. Pittsburg & S. R. Co.*, 31 *Pa. St.* 489; *Robinson v. Pittsburg & C. R. Co.*, 32 *Pa. St.* 334; *Caley v. Phil. & C. County R. Co.*, 80 *Pa. St.* 363; *Miller v. Hanover Junction R. Co.*, 87 *Pa. St.* 95, 99; *Schaeffer v. Mo. Home Ins. Co.*, 46 *Mo.* 248. The same suggestion applies in favor of creditors. *Ogilvie v. Knox Ins. Co.*, 22 *How.* 380; *Chubb v. Upton*, 95 *U. S.* 665.

compliance with the agreement rather than to a severely literal execution of its terms.¹ It appearing to be the intent to create a fund to be used for the construction of the road, the condition as to the location and construction will be satisfied when the road has been finally located on the required route, although not as yet constructed.² If the condition is that the road shall "pass through" or be built in a certain place, it is fulfilled by a permanent location before actual construction.³ Where the road is to be located within a certain distance from a given point, the distance is to be measured by a direct line, and not by the travelled route.⁴ A condition that the road shall be completed and the cars running to a certain place is complied with by the running of *hired* cars.⁵ If the state of the road is such that the cars can be run with reasonable safety and regularity, the condition is complied with although it may not be finished in every particular.⁶ If the road is built by another corporation which has succeeded to the powers of the one to which the subscription was made, the subscriber is holden.⁷ Where the construction of a road is a condition, it must be performed within a reasonable time, if no certain period is fixed.⁸ Proof of the circumstances attending the agreement is admissible to show its meaning.⁹

The subscription may be so drawn as to make the promise of the subscriber and the condition obligatory on the company independent stipulations, as where the day fixed for payment may

¹ *People v. Holden*, 82 Ill. 93.

² *McMillan v. Maysville & L. R. Co.*, 15 B. Monr. 218; *Evansville, I., & C. S. L. R. Co. v. Meeds*, 11 Ind. 273; *Miller v. Pittsburg & C. R. Co.*, 40 Pa. St. 237. For other cases as to construction of conditions, see *Nashville & N. W. R. Co. v. Jones*, 2 Cold. 574; *Branham v. Record*, 42 Ind. 181; *Iowa Northern Cent. R. Co. v. Bliobenes*, 41 Iowa, 267; *Taylor v. Cedar Rapids & St. P. R. Co.*, 25 Iowa, 371; *Jenkins v. Burlington & M. R. R. Co.*, 29 Iowa, 255; *O'Neal v. King*, 3 Jones (N. C.), 517. As to what is "a location," as the term is used in such contracts, see *Smith v. Allison*, 23 Ind. 366; *Parker v. Thomas*, 28 Ind. 277, 19 Ind. 213.

³ *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328; *Warner v. Callender*, 20 Ohio St. 190; *Mansfield, C., & L. M. R.*

Co. v. Stout, 26 Ohio St. 241; *Woonsocket Union R. Co. v. Sherman*, 8 R. I. 564; *North Missouri R. Co. v. Winkler*, 29 Mo. 318.

⁴ *Cedar Falls & M. R. Co. v. Rich*, 33 Iowa, 113; *Courtright v. Strickler*, 37 Iowa, 382. See *Virginia & T. R. Co. v. Lyon County*, 6 Nev. 68, 71; *Stockton R. Co. v. Stockton*, 51 Cal. 328.

⁵ *Courtright v. Deeds*, 37 Iowa, 503.

⁶ *Freeman v. Matlock*, 67 Ind. 99; *Ogden v. Kirby*, 79 Ill. 555.

⁷ *Detroit, L., & L. M. R. Co. v. Starnes*, 38 Mich. 698; *Mich. M. & C. R. Co. v. Bacon*, 33 Mich. 466.

⁸ *Smith v. Hollett*, 34 Ind. 519; *Stevens v. Corbitt*, 33 Mich. 458.

⁹ *Detroit, L., & L. M. R. Co. v. Starnes*, 38 Mich. 698.

happen before the road is built.¹ A mere stipulation that the instalments when collected shall be applied in a certain way does not create a condition precedent, as the money itself is required to carry the project into effect.² In such cases the subscriber will be bound by his subscription, but entitled to the remedies of a stockholder in enforcing a proper application of the amount paid. Whether a condition is a precedent or subsequent one is a question of intent, to be determined not only by the terms in which it is stated, but by the whole contract.³

Irregular or Illegal Action of the Corporation.—Irregularities in the organization and action of a corporation existing *de facto*, under color of law, or its commission of acts which would justify a forfeiture, are not a defence to a suit upon a subscription. Such matters cannot be inquired into collaterally, but only in a direct proceeding on the part of the State.⁴ *A fortiori* the subscriber cannot set up irregularities where he has consented to or waived them by his action as stockholder or director,⁵ or where the State

¹ Fort Edward & Ft. M. Plank Road Co. v. Payne, 17 Barb. 567, 579, 580, 15 N. Y. 583; Henderson & N. R. Co. v. Leavell, 16 B. Monr. 358; Chamberlain v. Painesville & H. R. Co., 15 Ohio St. 225.

² New Albany & S. R. Co. v. Pickens, 5 Ind. 247; New Albany & S. R. Co. v. Fields, 10 Ind. 187; Lane v. Brainerd, 30 Conn. 565; Miller v. Pittsburg & C. R. Co., 40 Pa. St. 237; Traer v. Stuart, 46 Iowa, 15. See Milwaukie & N. I. R. Co. v. Field, 12 Wis. 340.

³ Bucksport & B. R. Co. v. Brewer, 67 Me. 295.

⁴ Conn. & P. R. R. Co. v. Bailey, 24 Vt. 465; Montpelier & W. R. R. Co. v. Langdon, 46 Vt. 284, 45 Vt. 137; Bucksport & B. R. Co. v. Buck, 68 Me. 81, 65 Me. 536; Black River & U. R. Co. v. Clarke, 25 N. Y. 208; Buffalo & A. R. Co. v. Cary, 26 N. Y. 75; Cayuga Lake R. Co. v. Kyle, 64 N. Y. 185, 5 Thomp. & C. 659; Dorris v. French, 4 Hun, 292; Holyoke Bank v. Goodman Paper Man. Co., 9 Cush. 576; City Hotel v. Dickinson, 6 Gray, 586; Kishacoquillas & C. Turnp. Road Co. v. McConaby, 16 S. & R. 140; Hanover Junction & S. R. Co. v. Halde- man, 82 Pa. St. 36; Chubb v. Upton, 95

U. S. 665; Upton v. Hansbrough, 3 Biss. 417; Wight v. Shelby R. Co., 16 B. Monr. 4; Gill v. Ky. & C. Gold & S. M. Co., 7 Bush, 635; Gaff v. Flesher, 33 Ohio St. 107; Covington, C., C., & J. Plank Road Co. v. Moore, 3 Ind. 510; Judah v. American Live Stock Ins. Co., 4 Ind. 333; Stoops v. Greensburgh & B. Plank Road Co., 10 Ind. 47; Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275; Brownlee v. Ohio, I., & I. R. Co., 18 Ind. 68; Rice v. Rock Island & A. R. Co., 21 Ill. 93; Goodrich v. Reynolds, 31 Ill. 490; McCarthy v. Lavasche, 89 Ill. 270; Dows v. Naper, 91 Ill. 44; Swartwout v. Mich. A. L. R. Co., 24 Mich. 389; Monroe v. Ft. Wayne, J., & S. R. Co., 28 Mich. 272; Parker v. Northern Cent. Mich. R., 33 Mich. 23; Kansas City Hotel v. Hunt, 57 Mo. 126; Oregon Cent. R. Co. v. Scoggin, 3 Oreg. 161; Booker's Case, 18 Ark. 338; Lehman v. Warner, 61 Ala. 455.

⁵ Danbury & N. R. Co. v. Wilson, 22 Conn. 435; Lane v. Brainerd, 30 Conn. 565; Ridgefield & N. Y. R. Co. v. Reynolds, 46 Conn. 375; Bucksport & B. R. Co. v. Buck, 68 Me. 81, 65 Me. 536; Schenectady & S. Plank Road Co. v. Thatcher, 11 N. Y. 102; Phoenix Warehousing Co. v. Badger, 67 N. Y. 294,

has confirmed the defective proceedings of the corporation.¹ The subscriber admits by his subscription the existence and organization of the corporation.²

Generally the subscriber cannot avail himself of collateral matters in defence, — as, that the board of directors or commissioners did not, in distributing stock or in any matter intrusted to their discretion, act impartially and treat all alike;³ or that stockholders have given their proxies to certain parties, or with a certain purpose;⁴ or that the company has issued preferred stock;⁵ or done business at other places than that fixed by law;⁶ or that its name has been changed by the legislature;⁷ or that the articles of association contain an incomplete or defective description of the route and termini;⁸ or that the meetings of the corporation have not been legally notified;⁹ or that the election of the directors was not legal;¹⁰ or that the corporation or directors have done illegal acts, or acts which are void, as unauthorized by the charter,¹¹ or mismanaged the corporate business;¹²

6 Hun, 293; *Black River & U. R. Co. v. Barnard*, 31 Barb. 258; *McCully v. Pittsburg & C. R. Co.*, 32 Pa. St. 25; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Sanger v. Upton*, 91 U. S. 56; *Stone v. Great Western Oil Co.*, 41 Ill. 85; *Corwith v. Culver*, 69 Ill. 502; *Wheelock v. Kost*, 77 Ill. 296; *Central Plank Road Co. v. Clemens*, 16 Mo. 359; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *Clarke v. Thomas*, 34 Ohio St. 46, 62; *Maltby v. Northwestern Va. R. Co.*, 16 Md. 422; *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

¹ *Illinois Grand Trunk R. Co. v. Cook*, 29 Ill. 237; *Black River & U. R. Co. v. Barnard*, 31 Barb. 258.

² *Chubb v. Upton*, 95 U. S. 665; *Lail v. Mt. Sterling Coal Road Co.*, 13 Bush, 32; *Lehman v. Warner*, 61 Ala. 455; *Montpelier & W. R. R. Co. v. Langdon*, 46 Vt. 284; *ante*, Chap. I. p. 8.

³ *Conn. & P. R. R. Co. v. Bailey*, 24 Vt. 465; *Crocker v. Crane*, 21 Wend. 211; *Walker v. Devereaux*, 4 Paige, 229; *Swartwout v. Mich. A. L. R. Co.*, 24 Mich. 389.

⁴ *Ryder v. Alton & S. R. Co.*, 13 Ill. 516.

⁵ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 586.

⁶ *Courtright v. Deeds*, 37 Iowa, 503.

⁷ *Bucksport & B. R. Co. v. Buck*, 68 Me. 81, 65 Me. 536. See *Mahan v. Wood*, 44 Cal. 462.

⁸ *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185, 5 Thomp. & C. 659; *Boston, B., & G. R. Co. v. Wellington*, 113 Mass. 79.

⁹ *Bucksport & B. R. Co. v. Buck*, 68 Me. 81, 65 Me. 536.

¹⁰ *Johnson v. Crawfordsville, F. K., & Ft. W. R. Co.*, 11 Ind. 280; *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404; *Steinmetz v. Versailles & O. Turnp. Co.*, 57 Ind. 457.

¹¹ *Hays v. Ottawa, O., & F. R. V. R. Co.*, 61 Ill. 422; *Ottawa, O., & F. R. V. R. Co. v. Black*, 79 Ill. 262; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Hannibal, R., & P. Plank Road Co. v. Menefee*, 25 Mo. 547; *Merrill v. Reaver*, 50 Iowa, 404; *Booker's Case*, 18 Ark. 338; *Mississippi, O., & R. R. R. Co. v. Cross*, 20 Ark. 443; *Miss., O., & R. R. R. Co. v. Gaster*, 24 Ark. 96, 20 Ark. 455. Irregular proceedings for consolidation were held to release the subscriber in *Tuttle v. Mich. A. L. R. Co.*, 35 Mich. 247.

¹² *Hornaday v. Indiana & I. C. R. Co.*, 9 Ind. 263; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Merrill v. Reaver*, 50 Iowa, 404.

or that the location of the road as filed is defective;¹ or that its construction did not begin within the time fixed by the charter;² or that there has been delay or even a suspension in prosecuting the work;³ or that the road has not been completed, and is not likely to be;⁴ or that there has been a nonuser or misuser of franchises;⁵ or that the corporation has become insolvent;⁶ or even that the enterprise has been finally abandoned where funds are required to pay the corporate debts.⁷ But requirements essential to the validity of calls must be complied with.⁸

Amendments of the Charter; Change in the Scheme.—The relation between the shareholder and the company is one of contract, defined in the subscription and in the charter and existing laws applicable thereto. Like the member of a partnership or joint-stock company, he contributes his funds to the common stock for a special purpose; and a diversion of the same to an enterprise entirely different from the one originally contemplated is a breach of trust, entitling him to equitable remedies.⁹ It is not, indeed, every change, however formal or immaterial, which is to be regarded as altering his contract with the company, and discharging him from liability upon his subscription. The power of the State to impose police regulations, without having that effect, cannot be questioned. Nor will unimportant changes in the location of its road, or in its organization, when auxiliary to the original purpose and beneficial to the company and the interest of the subscriber, release him from liability on his subscription.¹⁰ Such are amendments extending the time for beginning or com-

¹ *Boston, B., & G. R. Co. v. Wellington*, 113 Mass. 79; *Cayuga Lake R. Co. v. Kyle*, 64 N. Y. 185, 5 Thomp. & C. 659.

² *Taggart v. Western Md. R. Co.*, 24 Md. 563.

³ *Gibson v. Columbia & N. R. Turnp. Co.*, 18 Ohio St. 396; *Miller v. Pittsburg & C. R. Co.*, 40 Pa. St. 237.

⁴ *Smith v. Gower*, 2 Duvall, 17.

⁵ *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204; *Mississippi, O., & R. R. Co. v. Cross*, 20 Ark. 443.

⁶ *Dill v. Wabash Valley R. Co.*, 21 Ill. 91; *Germantown Pass. R. Co. v. Fitler*, 60 Pa. St. 124; *Henry v. Vermillion & A. R. Co.*, 17 Ohio, 187.

⁷ *Hardy v. Merriweather*, 14 Ind. 203; *Bish v. Bradford*, 17 Ind. 490; *Phoenix Warehousing Co. v. Badger*, 67 N. Y.

294, 6 Hun, 293; *Morgan County v. Thomas*, 76 Ill. 120, 141. *Aliter*, if nothing is done under the charter within the time limited by statute. *McCully v. Pittsburg & C. R. Co.*, 32 Pa. St. 25.

⁸ *Spangler v. Indiana & I. C. R. Co.*, 21 Ill. 276. An illegal increase of capital stock was held to be a defence to a note given for stock. *Merrill v. Gamble*, 46 Iowa, 615; *Merrill v. Beaver*, 46 Iowa, 646.

⁹ *Livingston v. Lynch*, 4 Johns. Ch. 573; *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

¹⁰ *London & B. R. Co. v. Wilson*, 6 Bing. N. C. 135; *Midland Great Western R. Co. v. Gordon*, 16 M. & W. 804; *Clark v. Monongahela Nav. Co.*, 10 Watts, 364; *Gray v. Monongahela Nav.*

pleting the construction of the railroad ;¹ abbreviating the time for notice of calls ;² regulating the mode of payment ;³ extending the duration of the corporation to an inconsiderable degree ;⁴ changing the mode of appointing directors ;⁵ transferring to the directors the power to increase the capital stock heretofore exercised by the stockholders ;⁶ authorizing the issue of preferred stock,⁷ or a mortgage of the railroad and other property.⁸ But where, without the assent of the shareholder, the company procures from the legislature an alteration of its charter, which works a fundamental change in the purpose and business contemplated therein, and superadds to the original undertaking, or substitutes for it, a new and very different undertaking, he may well say, *Non hæc in fœdera veni*. He subscribed to a certain enterprise, defined by the charter and existing law ; and that enterprise having been changed without his assent, he is discharged from the obligation of the contract by a breach of the same on the part of the company. The legislative sanction to the alteration cannot divest him of his rights under the contract, as the obligation cannot be impaired by the State.⁹

An illustration of such a fundamental change would be the conversion of a corporation for maintaining a railroad into

Co., 2 W. & S. 156 ; Penn. & O. Canal Co. v. Webb, 9 Ohio, 136 ; Hartford & N. H. R. Co. v. Crosswell, 5 Hill, 383 ; New Orleans, J., & G. N. R. Co. v. Harris, 27 Miss. 517 ; Schenectady & S. Plank Road Co. v. Thatcher, 11 N. Y. 102 ; Peoria & O. R. Co. v. Elting, 17 Ill. 429 ; Sprigg v. Western Tel. Co., 46 Md. 67 ; Clearwater v. Meredith, 1 Wall. 25.

¹ Taggart v. Western Md. R. Co., 24 Md. 563.

² Illinois River R. Co. v. Zimmer, 20 Ill. 654 ; Illinois River R. Co. v. Beers, 27 Ill. 185.

³ Illinois River R. Co. v. Zimmer, 20 Ill. 654.

⁴ Union Agricultural & S. Assoc. v. Neill, 31 Iowa, 95.

⁵ New Haven & D. R. Co. v. Chapman, 38 Conn. 56.

⁶ Payson v. Stoeve, 2 Dill. 427 ; East Tenn. & V. R. Co. v. Gammon, 5 Sneed, 567.

⁷ Rutland & B. R. Co. v. Thrall, 35 Vt. 536 ; Everhart v. Phil. & W. C. R. Co., 28 Pa. St. 339.

⁸ Joy v. Jackson & M. Plank Road Co., 11 Mich. 155.

⁹ Hartford & N. H. R. Co. v. Crosswell, 5 Hill, 383 ; Troy & R. R. Co. v. Kerr, 17 Barb. 581 ; Macedon & B. Plank Road Co. v. Lapham, 18 Barb. 312 ; Kean v. Johnson, 1 Stock. 401 ; New Orleans, J., & G. N. R. Co. v. Harris, 27 Miss. 517 ; Winter v. Muscogee R. Co., 11 Ga. 438, 453 ; Pacific R. Co. v. Renshaw, 18 Mo. 210 ; Banet v. Alton & S. R. Co., 13 Ill. 504 ; Carlisle v. Terre Haute & R. R. Co., 6 Ind. 316 ; Fry v. Lexington & B. S. R. Co., 2 Met. (Ky.) 314 ; Stevens v. Rutland & B. R. Co., 29 Vt. 545 ; Everhart v. Phil. & W. C. R. Co., 28 Pa. St. 339 ; Southern Penn., I., & R. Co. v. Stevens, 87 Pa. St. 190. The company has been enjoined from collecting subscriptions in such a case. Illinois Grand Trunk R. Co. v. Cook, 29 Ill. 237. A stockholder whose stock has been forfeited is not relieved from the payment of a note for his stock by a material amendment. Mitchell v. Rome R. Co., 17 Ga. 574.

one for carrying on the business of banking or manufacturing, or running steamboats exclusively, or for maintaining a railroad which has an entirely different location, or which runs in an opposite direction from the one originally contemplated.¹ So, also, where a party subscribes for stock in a corporation, the division of its railroad into different parts, and the creation of several corporations, each to be the proprietor of a distinct part, releases him from liability, and the subscription cannot be enforced by the new corporations.² But the mere division of the road into sections, and the apportionment of the subscriptions to the different sections with reference to the residence of subscribers,—the unity of the corporation not being disturbed,—does not release the subscriber.³ One corporation cannot recover on a subscription to another, however identical the object, name, or persons who have subscribed.⁴

The doctrine that the subscriber is discharged by amendments of the charter was applied at an early day to turnpike and other corporations in which parties were induced to take stock, less as an investment than on account of some convenience or advantage peculiar to themselves. The change in the course of the turnpike by authority of an amendment to the charter, or of some enlargement of corporate powers, was held to release the subscriber.⁵ This doctrine, which was thus applied to enterprises of a nar-

¹ *Kenosha, R., & R. I. R. Co. v. Marsh*, 17 Wis. 13; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336, 348; *Sprague v. Illinois River R. Co.*, 19 Ill. 174. The conversion of a "life and accident" insurance company into a "fire, marine, and inland" insurance company, was held to release a subscriber. *Ashton v. Burbank*, 2 Dill. 435. See *Dorris v. Sweeney*, 60 N. Y. 463. The legislature cannot convert a promise to contribute to a specified object into an agreement to take stock in a particular corporation. *Pittsburg & S. R. Co. v. Gazzam*, 32 Pa. St. 340.

² *Marsh v. Fulton County*, 10 Wall. 676, 21 Ill. 338; *Carlisle v. Terre Haute & R. R. Co.*, 6 Ind. 316; *Indiana & E. Turnp. Co. v. Phillips*, 2 Penrose & W. 184. In *Marsh v. Fulton County*, the defendant county had voted a subscription to the original corporation, which, it was held, could not take effect as a sub-

scription to either of those substituted for it.

³ *Ross v. Chicago, B., & Q. R. Co.*, 77 Ill. 127; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654.

⁴ *Thrasher v. Pike County R. Co.*, 25 Ill. 393. But a mere change of name does not make a different corporation. *Racine County Bank v. Ayres*, 12 Wis. 512; *Milwaukie & N. I. R. Co. v. Field*, 12 Wis. 340.

⁵ *Middlesex Turnp. Co. v. Locke*, 8 Mass. 268 (1811); *Middlesex Turnp. Co. v. Swan*, 10 Mass. 384 (1813); *Union Locks & Canals v. Towne*, 1 N. H. 44; *Indiana & E. Turnp. Co. v. Phillips*, 2 Penrose & W. 184; *Mercer County v. Covert*, 6 W. & S. 70; *Macedon & B. Plank Road Co. v. Lapham*, 18 Barb. 312; *Freemont Ferry & B. Co. v. Fuhrman*, 8 Neb. 99. But see *Irvin v. Turnpike Co.*, 2 Penrose & W. 466; *Gray v. Monongahela Nav. Co.*, 2 W. & S. 156.

row scope, and before the law of corporations had been developed, was held to be a good defence when first set up by the subscribers to stock in railroad corporations. Thus, in the earliest case in which a subscriber for such stock maintained this defence, it was held that he was released where the corporation procured an amendment authorizing it to purchase and hold steamboats, to be used in connection with its railroad, and to increase its capital stock for the purpose, thus making a longer line of transportation than that fixed by the termini of the railroad. It was considered that a radical change or alteration in the charter, admitting new and additional objects and responsibilities, could not bind dissenting subscribers, and that the amendment in question had superadded a new and very different enterprise to the original undertaking.¹

The vexed question as to the effect of amendments, which have been accepted by the corporation, upon the liability of subscribers most frequently occurs in the case of changes in route or termini, or the extension or shortening of the line, or the merger of the corporation in a new corporation, or a sale of the railroad and franchise; and here the authorities are in an irreconcilable conflict. Thus it has been held, following the early cases already referred to, that a substantial change of route, so as to remove the enterprise from a county which was a part of the contemplated route,² or a substantial change of the termini,³ the extension of the line by the construction of a material addition, or by transportation by water,⁴ a large increase of the capital stock,⁵ the sale of the railroad,⁶ or a consolidation with another corporation,⁷—each change being made under the authority of an amendatory act,—released the subscriber. But, on the other

¹ *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383 (1843).

² *Hester v. Memphis & C. R. Co.*, 32 Miss. 378; *Champion v. Memphis & C. R. Co.*, 35 Miss. 692; *Witter v. Miss., O., & R. R. Co.*, 20 Ark. 463; *Buffalo, C., & N. Y. R. Co. v. Pottle*, 23 Barb. 21.

³ *Manheim P. & L. Turnp. Co. v. Arndt*, 31 Pa. St. 317; *Winter v. Muscogee R. Co.*, 11 Ga. 438.

⁴ *Marietta & C. R. Co. v. Elliott*, 10 Ohio St. 57; *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 383; *Macedon & B. Plank Road Co. v. Lapham*, 18 Barb. 312.

⁵ *Hughes v. Antietam Man. Co.*, 34 Md. 316.

⁶ *South Georgia & F. R. Co. v. Ayres*, 56 Ga. 230. In *New Orleans, J., & G. N. R. Co. v. Harris*, 27 Miss. 517, it was held that the sale authorized by an amendatory act which was accepted by the corporation was void, and, notwithstanding his assent to it, he did not become liable to the purchasing corporation, but remained liable to the one for whose stock he had subscribed.

⁷ *McCray v. Junction R. Co.*, 9 Ind. 358, 359; *Booe v. Junction R. Co.*, 10 Ind. 93; *New Jersey Midland R. Co. v. Strait*, 6 Vroom, 322; *Clearwater v. Meredith*, 1 Wall. 25.

hand, it has been held, even in jurisdictions where the general doctrine that fundamental amendments release a subscriber is accepted, that such changes as the following, when auxiliary to and promotive of the original scheme, did not release him; as, subscriptions for the stock of other companies,¹ the substitution of water transportation for a part of the line,² the reduction of the length of the road,³ changes of termini and route to the extent of several miles, and a deviation from the county where the subscriber lived, or was interested in real estate,⁴ the building of branches and extensions,⁵ and consolidations with companies which were the owners of connecting or intersecting railroads.⁶

The impracticability of drawing any definite line between amendments which are fundamental, and could not have been contemplated by a subscriber at the time he entered into the contract, and those which are merely auxiliary to the purpose of the corporation as defined by the charter, is confessed by the tribunals which have held a radical departure from that purpose to be a defence; and the view is taken that each case must be determined by its own circumstances.⁷

A subscriber is not released, even by a material amendment, where he is not injured by it; as where it has not been acted upon,⁸ or where the corporation has been permanently enjoined from using the powers conferred by it.⁹ So, also, he is not released where he has himself expressly or by his acts assented to the changes or acquiesced in them.¹⁰

¹ *Terre Haute & A. R. Co. v. Earp*, 21 Ill. 291.

² *Midland G. W. R. Co. v. Gordon*, 16 M. & W. 804.

³ *Conn. & P. R. R. Co. v. Bailey*, 24 Vt. 465, 479.

⁴ *Banet v. Alton & S. R. Co.*, 13 Ill. 504; *Delaware R. Co. v. Tharp*, 1 Houst. 149; *Johnson v. Pensacola & G. R. Co.*, 9 Fla. 299; *Central Plank Road Co. v. Clemens*, 16 Mo. 359.

⁵ *Greenville & C. R. Co. v. Coleman*, 5 Rich. 118; *Peoria & R. I. R. Co. v. Preston*, 35 Iowa, 115; *Rice v. Rock Island & A. R. Co.*, 21 Ill. 93.

⁶ *Sprague v. Illinois River R. Co.*, 19 Ill. 174; *Hanna v. Cincinnati & Ft. W. R. Co.*, 20 Ind. 30. But see *Tuttle v. Mich. A. L. R. Co.*, 35 Mich. 247.

⁷ *Hester v. Memphis & C. R. Co.*, 32 Miss. 378; *Champion v. Memphis & C. R. Co.*, 35 Miss. 692.

⁸ *Fry v. Lexington & B. S. R. Co.*, 2 Met. (Ky.) 314; *Hawkins v. Miss. & T. R. Co.*, 35 Miss. 688; *Johnson v. Pensacola & G. R. Co.*, 9 Fla. 299; *Booker's Case*, 18 Ark. 338.

⁹ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

¹⁰ *Hayworth v. Junction R. Co.*, 13 Ind. 348; *Witter v. Miss., O., & R. R. R. Co.*, 20 Ark. 463; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *North Carolina R. Co. v. Leach*, 4 Jones, 340; *Martin v. Pensacola & G. R. Co.*, 8 Fla. 370; *May v. Memphis B. R. Co.*, 48 Ga. 109; *Memphis Branch R. Co. v. Sullivan*, 57 Ga. 240; *Payson v. Stoeve*, 2 Dill. 427; *Mowrey v. Indian-*

A subscriber is not released by corporate action, although fundamental, which is authorized by laws existing when the subscription was made, and presumably entering into the contract. Thus, if such laws authorized a consolidation with other corporations or an alteration in the route, the execution of the authority does not release the subscriber.¹ The same rule applies where the change is authorized by the subscription itself.²

A reservation of legislative power to alter or amend the charter contained in the charter itself, or some prior general law, enters into the contract of subscription; and a person who takes stock in view of such a reservation assents in advance to such alterations and amendments as may be made in pursuance thereof. Thus, where this power is reserved, the subscriber is not released by the increase or reduction of the capital stock,³ subscriptions to the capital stock of other corporations,⁴ the extension of the railroad,⁵ the construction of branches,⁶ the sale or lease of the road,⁷ consolidations with other corporations,⁸ a new organization under an amended or substituted charter,⁹ the increase of the liability of stockholders,¹⁰ the extension of the time

apolis & C. R. Co., 4 Biss. 78; Booker's Case, 18 Ark. 338; Chetlain v. Republic Life Ins. Co., 86 Ill. 220.

¹ Nugent v. Supervisors, 19 Wall. 241; East Lincoln v. Davenport, 94 U. S. 801; Colvin v. Liberty & A. Turnp. Co., 2 Ind. 511; Railsback v. Liberty & A. Turnp. Co., 2 Ind. 656; Sparrow v. Evansville & C. R. Co., 7 Ind. 369; Bish v. Johnson, 21 Ind. 299; Noyes v. Spaulding, 27 Vt. 420; Fry v. Lexington & B. S. R. Co., 2 Met. (Ky.) 314; Newhall v. Galena & C. U. R. Co., 14 Ill. 273; Hays v. Ottawa, O., & F. R. V. R. Co., 61 Ill. 422; Ottawa, O., & F. R. V. R. Co. v. Black, 79 Ill. 262; Mowrey v. Indianapolis & C. R. Co., 4 Biss. 78; Macedon & B. Plank Road Co. v. Lapham, 18 Barb. 312; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; East Tenn. & V. R. Co. v. Gammon, 5 Sneed, 567; Burlington & M. R. R. Co. v. White, 5 Iowa, 409.

² Cork & Y. R. Co. v. Paterson, 16 C. B. 414; Nixon v. Brownlow, 2 H. & N. 455, 3 H. & N. 686. See Illinois River R. Co. v. Beers, 27 Ill. 185.

³ Schenectady & S. Plank Road Co. v.

Thatcher, 11 N. Y. 102; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Troy & R. R. Co. v. Kerr, 17 Barb. 581; Moore v. Hudson River R. Co., 12 Barb. 156; White Hall & P. R. Co. v. Myers, 16 Abbott Pr. n. s. 34; Pacific R. Co. v. Hughes, 22 Mo. 291.

⁴ White v. Syracuse & U. R. Co., 14 Barb. 559.

⁵ Pacific R. Co. v. Renshaw, 18 Mo. 210; Pacific R. Co. v. Hughes, 22 Mo. 291; Durfee v. Old Colony & F. R. R. Co., 5 Allen, 230.

⁶ Schenectady & S. Plank Road Co. v. Thatcher, 11 N. Y. 102; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Northern R. Co. v. Miller, 10 Barb. 260.

⁷ Troy & R. R. Co. v. Kerr, 17 Barb. 581; *post*, Chap. XVII. p. 458.

⁸ Bishop v. Brainerd, 28 Conn. 289; Smith v. Boston & M. R., 6 Allen, 262, 275; Scotland v. Thomas, 94 U. S. 682.

⁹ Sprigg v. Western Tel. Co., 46 Md. 67.

¹⁰ Meadow Dam Co. v. Gray, 30 Me. 547.

for completing the railroad,¹ or other similar changes, made under the authority of amendatory acts.

The doctrine, that the legislative reservation of power to amend the charter requires the subscriber to submit to such amendments as may be afterwards made in pursuance thereof, is usually stated with a qualification. It does not, as commonly defined, justify such radical and fundamental changes as divert the corporation from its original purpose, or work a revolution in its character and objects.² A subscriber, it has been held, is, notwithstanding the reservation, released by an extension and consolidation under legislative authority, which practically substitutes a new enterprise for the original one.³ The reserved power cannot be used to impair the obligation of contracts with third parties, or to destroy vested rights.⁴

The motives and inducements peculiar to a subscriber — those, for instance, arising from his place of living, or from the nearness of his property to the railroad — have been pressed in his defence where changes in the enterprise have made it in these respects less attractive and beneficial to him; but the better view is that the investment is to be conclusively presumed to have been made with reference to general considerations common to all subscribers, such as expected profits from the enterprise, and public convenience, and not with reference to incidental or local advantages, which might influence one and not another.⁵

The doctrine that a subscriber may resist payment of his subscription by setting up material alterations in the scheme described in the charter has not proved satisfactory in practice to

¹ *Agricultural Branch R. Co. v. Winchester*, 13 Allen, 29; *Poughkeepsie & S. P. Plank Road Co. v. Griffin*, 24 N. Y. 150; *Bailey v. Hollister*, 26 N. Y. 112. But the granting and use of such a power is not a fundamental change which releases a subscriber, even where there is no reserved power of amendment.

² *Durfee v. Old Colony & F. R. R. Co.*, 5 Allen, 230, 247; *Northern R. Co. v. Miller*, 10 Barb. 260; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 386, 348; *Newhall v. Galena & C. U. R. Co.*, 14 Ill. 273; *Booe v. Junction R. Co.*, 10 Ind. 93; *post*, p. 459.

³ *Kenosha, R., & R. I. R. Co. v. Marsh*,

17 Wis. 13; *Noesen v. Port Washington*, 37 Wis. 168; *Perkins v. Port Washington*, 37 Wis. 177; *Zabriskie v. Hackensack & N. Y. R. Co.*, 3 C. E. Green, 178.

⁴ *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56; *Durfee v. Old Colony & F. R. R. Co.*, 5 Allen, 230, 247; *Carlisle v. Terre Haute & R. R. Co.*, 6 Ind. 316.

⁵ *Irvin v. Turnp. Co.*, 2 Penrose & W. 466; *Banet v. Alton & S. R. Co.*, 13 Ill. 504; *Sprague v. Illinois River R. Co.*, 19 Ill. 174; *Illinois River R. Co. v. Zimmer*, 20 Ill. 654; *Fry v. Lexington & B. S. R. Co.*, 2 Met. (Ky.) 314; *Delaware R. Co. v. Tharp*, 1 Houst. 149.

the judicial mind, and it has rarely availed him as a defence. The express contract, it may be noted, is merely for the payment of a certain sum for a certain interest in the corporation, and it is one which amendments do not directly disturb.¹ The doctrine in question imports into the contract a condition which the parties did not see fit to express in it, and admits, against the general rule, inquiry into collateral matters. If the changes are legal, — that is, authorized by a statute which is itself constitutional, — the subscriber is to be presumed to have contemplated them when he subscribed; and if they are not legal, he has the stockholder's remedy in equity to prevent them by an injunction.² This view applies to corporate investments generally, and it applies peculiarly to railroad enterprises which involve large public interests, and which naturally and wisely develop from local highways to extended lines of communication.³

What alterations in the charter and business of the company are a violation of the rights of a stockholder has been determined in cases where he has sought from a court of equity an injunction against the use of the corporate funds for purposes not contemplated in the original scheme. He is entitled to this remedy where the corporation commits a breach of trust by applying its funds to works not authorized by statute, or to works which a statute assumes to authorize in violation of the provision of the national Constitution for the protection of contracts. Thus, an amendatory act authorizing the extension of a railroad, of about a hundred miles in length, to the extent of thirty additional miles, was held a fundamental alteration of the charter, and the company was enjoined at the suit of a stockholder from applying its general funds, which were contributed before the amendment, to the extension authorized by it.⁴ An injunction has been

¹ *Gray v. Monongahela Nav. Co.*, 2 W. & S. 156; *Delaware R. Co. v. Tharp*, 1 Houst. 149.

² *Hays v. Ottawa, O., & F. R. V. R. Co.*, 61 Ill. 422; *Ottawa, O., & F. R. V. R. Co. v. Black*, 79 Ill. 262; *Pacific R. Co. v. Hughes*, 22 Mo. 291; *North Carolina R. Co. v. Leach*, 4 Jones (N. C.), 340; *Noyes v. Spaulding*, 27 Vt. 420, 430. In *South Georgia & F. R. Co. v. Ayres*, 56 Ga. 230, the subscriber was held to be released by illegal proceedings for consolidation.

³ *Pacific R. Co. v. Hughes*, 22 Mo. 291; *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56; *Ffooks v. South Western R. Co.*, 1 Smale & G. 142, 162. The character of railroad corporations in this regard is intelligently treated in two well-reasoned cases in Illinois. *Banet v. Alton & S. R. Co.*, 13 Ill. 504; *Sprague v. Illinois River R. Co.*, 19 Ill. 174.

⁴ *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545; *Chapman v. Mad River & L. E. R. Co.*, 6 Ohio St. 119.

granted at the suit of a stockholder, to prevent a sale of the road, or a consolidation of the corporation with other corporations.¹ But the right to this remedy may be lost by assent to the change, or by acquiescence or unreasonable delay;² and it is available only to those who have complied with the terms of their subscription.³ The company, while being enjoined from using its original funds for the new and different undertaking, has been allowed to apply to it any new funds obtained for the specific purpose.⁴ The State may also, in the exercise of its right of eminent domain, condemn a stockholder's shares, and authorize sales and consolidations which would otherwise be unconstitutional, by requiring the corporation to pay to dissenting stockholders the market value of their shares.⁵ If a right to amend the charter is reserved, a stockholder is not entitled to an injunction to prevent extensions and consolidations, at least where they do not amount to an undertaking different in kind from that originally authorized.⁶

Calls and Assessments. — The conditions which the statute prescribes, as precedent to the collection of the subscriptions, must be complied with. Thus, the formal action of the directors or stockholders directing a call to be made, and perhaps also appointing a time and place of payment, may be required in order to fix the subscriber's liability.⁷ Several calls may be made by one vote.⁸ If a vote of three-fourths of the stockholders is essential to a call, the subscriber will not be liable, without such a vote, to an action brought by the trustees in bankruptcy.⁹

The company cannot make assessments to an amount beyond the limit fixed by the charter.¹⁰ The directors cannot, unless

¹ *Kean v. Johnson*, 1 Stock. 401; *Mowrey v. Indianapolis & C. R. Co.*, 4 Biss. 78. But see *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42.

² See *post*, chapter on CORPORATE POWERS.

³ *Busey v. Hooper*, 35 Md. 15.

⁴ *Stevens v. Rutland & B. R. Co.*, 29 Vt. 545.

⁵ *Black v. Delaware & R. Canal Co.*, 9 C. E. Green, 455, 7 C. E. Green, 130.

⁶ *Durfee v. Old Colony & F. R. R. Co.*, 5 Allen, 230.

⁷ *Banet v. Alton & S. R. Co.*, 13 Ill. 504; *Ross v. Lafayette & I. R. Co.*, 6 Ind.

297; *Price v. Grand Rapids & I. R. Co.*, 18 Ind. 137; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435, 454; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Penobscot R. Co. v. White*, 41 Me. 512; *Hays v. Pittsburgh & S. R. Co.*, 38 Pa. St. 81; *Louisiana Paper Co. v. Waples*, 3 Woods, 34.

⁸ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Penobscot R. Co. v. Dummer*, 40 Me. 172.

⁹ *Louisiana Paper Co. v. Waples*, 3 Woods, 34.

¹⁰ *Great Falls & C. R. Co. v. Copp*, 38 N. H. 124.

authorized by statute, increase the capital stock.¹ Where the directors are authorized to make the assessment, a majority must act in directing it and determining the amount. The power involves the exercise of judgment and discretion, and cannot be delegated.²

Payment, Modes of.—The subscriptions should be paid in money, unless the statute otherwise provides, as this mode of payment alone secures equality of contribution among subscribers.³ A check payable *in præsentia*, and drawn on funds actually on deposit, is treated as the equivalent of cash.⁴ But payment in other modes has been recognized as a proper satisfaction of the subscription: as, promissory notes or bonds of the subscriber, secured by mortgage,⁵ or even unsecured;⁶ the stock of other corporations,⁷ and even other stock of the corporation for the capital stock of which the subscription was made;⁸ real estate;⁹ labor and materials, particularly such as are used in the construction of the railroad;¹⁰ damages for land taken by the company,

¹ Chicago City R. Co. v. Allerton, 18 Wall. 233; Eidman v. Bowman, 58 Ill. 444.

² Monmouth Mut. Fire Ins. Co. v. Lowell, 59 Me. 504; Pike v. Bangor & C. S. L. R. Co., 68 Me. 445; Silver Hook Road v. Greene, 12 R. I. 164; *ante*, Chap. II. p. 34.

³ Neuse River Nav. Co. v. Newbern, 7 Jones (N. C.), 275; Barnes v. Brown, 11 Hun, 815, 10 N. Y. Week. Dig. 227; Tasker v. Wallace, 6 Daly, 364; Knowlton v. Congress & E. S. Co., 57 N. Y. 518, 542; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Cleland's Case, L. R. 14 Eq. Cas. 387. See Beach v. Smith, 30 N. Y. 116, 28 Barb. 254.

⁴ People v. Stockton & V. R. Co., 45 Cal. 306.

⁵ Clark v. Farrington, 11 Wis. 306; Blunt v. Walker, 11 Wis. 334; Cornell v. Hichens, 11 Wis. 353; Waldo v. Chicago, St. P., & F. R. Co., 14 Wis. 575; Lyon v. Ewings, 17 Wis. 61; Andrews v. Hart, 17 Wis. 297; Western Bank v. Tallman, 17 Wis. 530; Cincinnati, I., & C. R. Co. v. Clarkson, 7 Ind. 595; Hardy v. Merryweather, 14 Ind. 203; State v. Bailey, 16 Ind. 46; Carr v. LeFevre, 27 Pa. St. 413; Illinois Grand Trunk R. Co. v. Cook, 29 Ill. 237.

⁶ Goodrich v. Wilder, 31 Ill. 490; Vermont Cent. R. Co. v. Claves, 21 Vt. 30;

Greenville & C. R. Co. v. Woodside, 5 Rich. 145. See Nutter v. Lexington & W. C. R. Co., 6 Gray, 85.

⁷ East New York & J. R. Co. v. Light-hall, 6 Rob. (N. Y.) 407; Swatara R. Co. v. Brune, 6 Gill, 41. Stock was paid for in "Confederate bonds" in Mercantile Trading Co., *In re*, L. R. 11 Eq. Cas. 131.

⁸ City Bank of Columbus v. Bruce, 17 N. Y. 507; Currier v. Lebanon Slate Co., 56 N. H. 262.

⁹ Cincinnati, I., & C. R. Co. v. Clarkson, 7 Ind. 595; Junction R. Co. v. Reeve, 15 Ind. 236; State v. Bailey, 16 Ind. 46; Goodin v. Evans, 18 Ohio St. 150; Osgood v. King, 42 Iowa, 478; Baglan Hall Colliery Co., *In re*, L. R. 5 Ch. App. 346; Spargo's Case, L. R. 8 Ch. App. 407; Limehouse Works Co., *In re*, L. R. 17 Eq. Cas. 169.

¹⁰ Haywood & P. Plank Road Co. v. Bryan, 6 Jones (N. C.), 82; Ohio, I., & I. R. Co. v. Cramer, 23 Ind. 490; Phil. & W. C. R. Co. v. Hickman, 28 Pa. St. 318; Pittsburg & C. R. Co. v. Stewart, 41 Pa. St. 54; Louisville & N. R. Co. v. Thompson, 18 B. Monr. 735; Phillips v. Covington & C. Bridge Co., 2 Met. (Ky.) 219; Eppes v. Miss., G., & T. R. Co., 35 Ala. 33; Van Cott v. Van Brunt, 2 Abbott N. C. 283; Ridgefield & N. Y. R. Co. v. Brush, 43 Conn. 86; Boody v. Rut. &

or any legal liability incurred by it;¹ but the assignment of patent-rights, of unascertained value, is not a proper payment.² The directors cannot, in fraud of creditors, put a value on property, so received in payment, in excess of its known real value.³ The payment should be real and *bona fide*, and not fictitious and simulated;⁴ but its validity will not, in the absence of fraud, be affected by a subsequent depreciation in the value of the property received in payment.⁵ The authority to receive payment otherwise than in money is sometimes expressly given by statute.⁶ In Pennsylvania, the commissioners appointed to receive subscriptions can take payment only in cash, but this restriction does not apply to the corporation when fully organized.⁷ Where the subscriber makes default in his agreement to pay in materials, he becomes liable for the amount in money.⁸ If he has his election whether to pay in money or some equivalent, a suit cannot be maintained against him for the amount of his subscription until he has had an opportunity to elect.⁹ Payment by instalments cannot be enforced in the case of subscriptions payable in work and materials.¹⁰

The company cannot lawfully issue shares to subscribers on the payment of less than their par value; and this restriction has been applied also to the issue of bonds convertible into stock.¹¹ But it may, when it becomes after an original issue the owner of its own stock by purchase or forfeiture, sell the same like any other owner.¹²

Compromises; Settlements in Fraud of Creditors and Stockholders. — The company may, in good faith, and when not insol-

B. R. Co., 24 Vt. 660; Cabot & W. S. Bridge Co. v. Chapin, 6 Cush. 50; Boston, B., & G. R. Co. v. Wellington, 113 Mass. 79; Ashuelot Boot & Shoe Co. v. Hoit, 56 N. H. 548-558.

¹ Phil. & W. C. R. Co. v. Hickman, 28 Pa. St. 318.

² Tasker v. Wallace, 6 Daly, 364.

³ Osgood v. King, 42 Iowa, 478; Boynton v. Hatch, 47 N. Y. 225; Schenck v. Andrews, 57 N. Y. 133; Van Cott v. Van Brunt, 2 Abbott N. C. 283.

⁴ Sawyer v. Hoag, 17 Wall. 610; Boynton v. Hatch, 47 N. Y. 225.

⁵ Protection Life Ins. Co. v. Osgood, 93 Ill. 69.

⁶ Dayton & C. R. Co. v. Hatch, 1 Disney, 84; Goodin v. Evans, 18 Ohio St. 150.

⁷ *Ante*, p. 50, cases cited in note 2.

⁸ Haywood & P. Plank Road Co. v. Bryan, 6 Jones (N. C.), 82; Hayworth v. Junction R. Co., 13 Ind. 348.

⁹ Eppes v. Mississippi, G., & T. R. Co., 35 Ala. 33.

¹⁰ Ohio, I., & I. R. Co. v. Cramer, 23 Ind. 490.

¹¹ Sturges v. Stetson, 1 Biss. 246; Fosdick v. Sturges, 1 Biss. 255; Putnam v. New Albany, 4 Biss. 365; Sawyer v. Hoag, 17 Wall. 610; Knowlton v. Congress & E. S. Co., 57 N. Y. 518, 542; Fisk v. Chicago, R. I., & P. R. Co., 53 Barb. 513; Neuse River Nav. Co. v. Newbern, 7 Jones (N. C.), 275.

¹² Otter v. Brevoort Petroleum Co., 50 Barb. 247.

vent, compromise disputes with subscribers, and release a part of the amount subscribed in order to secure the residue.¹ But agreements made by the directors with a subscriber, which release him from liability upon his subscription, or are otherwise contrary to the equal rights and obligations of stockholders, or work a fraud upon the creditors of the corporation, are void.²

Statute of Limitations. — The Statute of Limitations begins to run on calls from the time they are duly made.³ It has been held to bar the right to enforce the subscription where no call has been made within the statute period of limitation for suits on contracts.⁴ But where a subscriber has retained in his possession the book containing the subscription, the statute does not begin to run till he has delivered it to the company.⁵ A subscriber is not entitled to a certificate of stock, without payment of all calls, including those barred by the statute.⁶

Proof of Subscriptions. — The records of the company are competent and *prima facie* evidence in suits against subscribers whose subscriptions have been otherwise proved, to prove the subscription of the required number of shares and other proceedings necessary to the making of assessments.⁷ Signatures are proved

¹ Phil. & W. C. R. Co. v. Hickman, 28 Pa. St. 318; Miller v. Second Jefferson Building Assoc., 50 Pa. St. 32; Macon & A. R. Co. v. Vason, 57 Ga. 314. See Sawyer v. Hoag, 17 Wall. 610; New Albany v. Burke, 11 Wall. 96; Cooper v. Frederick, 9 Ala. 738; Penobscot & K. R. Co. v. Dunn, 39 Me. 587, 601; Gelpcke v. Blake, 19 Iowa, 263; Putnam v. New Albany, 4 Biss. 365; Bedford R. Co. v. Bowser, 48 Pa. St. 29; Adamson's Case, L. R. 18 Eq. Cas. 670; Bath's Case, L. R. 8 Ch. Div. 334; Kepling v. Todd, L. R. 3 C. P. Div. 350.

² Mann v. Cooke, 20 Conn. 178; Mann v. Pentz, 2 Sandf. Ch. 257; Mann v. Currie, 2 Barb. 294; Nathan v. Whitlock, 9 Paige, 152; Tuckerman v. Brown, 33 N. Y. 297; Burke v. Smith, 16 Wall. 390; Sawyer v. Hoag, 17 Wall. 610; Upton v. Tribilcock, 91 U. S. 45; Bachman's Case, 12 Nat. Bank. Reg. 223; Chandler v. Brown, 77 Ill. 333; Zirkel v. Joliet Opera House Co., 79 Ill. 334; Melvin v. Lamar Ins. Co., 80 Ill. 446; Swartwout v. Mich. A. L. R. Co., 24 Mich. 389; Graff v.

Pittsburg & S. R. Co., 31 Pa. St. 489; Bedford R. Co. v. Bowser, 48 Pa. St. 29; Penobscot & K. R. Co. v. Dunn, 39 Me. 587, 601; Currier v. Lebanon Slate Co., 56 N. H. 262; Hughes v. Antietam Man. Co., 34 Md. 316.

³ Gibson v. Columbia & N. R. Turnp. & B. Co., 18 Ohio St. 396; Taggart v. Western Md. R. Co., 24 Md. 563; Western R. Co. v. Avery, 64 N. C. 491.

⁴ Pittsburg & C. R. Co. v. Byers, 32 Pa. St. 22; McCully v. Pittsburg & C. R. Co., 32 Pa. St. 25; Pittsburg & C. R. Co. v. Graham, 36 Pa. St. 77.

⁵ Pittsburg & C. R. Co. v. Plummer, 37 Pa. St. 413.

⁶ Johnson v. Albany & S. R. Co., 54 N. Y. 416.

⁷ White Mts. R. Co. v. Eastman, 34 N. H. 124; Penobscot & K. R. Co. v. Dunn, 39 Me. 587; Penobscot R. Co. v. Dummer, 40 Me. 172; Penobscot R. Co. v. White, 41 Me. 512; Marlborough Branch R. Co. v. Arnold, 9 Gray, 159; Woonsocket Union R. Co. v. Sherman, 8 R. I. 564; Lane v. Brainerd, 30 Conn. 565; Ryder v. Alton

by the admissions of the parties, or the testimony of persons who were present when they were made.¹

Demand and Notice.—Demand of payment of calls, or notice of time and place for payment, need not precede a suit against the subscriber, unless prescribed by statute.² Nor is any demand required where the time of payment is fixed by the agreement.³ A demand by personal notice or by publication, when prescribed by statute, must be made;⁴ and when so prescribed, should be averred in the declaration to have been made.⁵ When a notice by publication is required, the mode has been held directory, and satisfied by personal notice.⁶ If the mode is not prescribed, notice by publication is sufficient.⁷ The requirement may be waived by the subscriber.⁸ The omission to give a notice of assessments to the governor of the State, as required by statute, cannot be

& S. R. Co., 13 Ill. 516; *Culver v. Third Nat. Bank*, 64 Ill. 528; *Dows v. Naper*, 91 Ill. 44; *Bavington v. Pittsburg & S. R. Co.*, 34 Pa. St. 358; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Breedlove v. Martinsville & F. R. Co.*, 12 Ind. 114; *Macon & A. R. Co. v. Vason*, 57 Ga. 314. See *Partridge v. Badger*, 25 Barb. 146. In *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215, they were held not admissible against parties subscribing on conditions which have not been performed. On proof of loss of books and original subscription papers, parol evidence is admissible. *Graff v. Pittsburg & S. R. Co.*, 31 Pa. St. 489; *Hays v. Pittsburg & S. R. Co.*, 38 Pa. St. 81; *Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273, 10 Ind. 539.

¹ *Phil. & W. C. R. Co. v. Hickman*, 28 Pa. St. 318, 328. Subscriptions are not to be proved by mere records. *Mudgett v. Morrell*, 33 Cal. 25.

² *New Albany & S. R. Co. v. Pickens*, 5 Ind. 247; *Ross v. Lafayette & I. R. Co.*, 6 Ind. 297; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499; *Johnson v. Crawfordsville R. Co.*, 11 Ind. 280; *Smith v. Indiana & I. R. Co.*, 12 Ind. 61; *Breedlove v. Martinsville & F. R. Co.*, 12 Ind. 114; *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404; *Brownlee v. Ohio, I., & I. R. Co.*, 18 Ind. 68; *Lake Ontario, A., & N. Y. R. Co. v. Mason*, 16 N. Y. 451; *Eppes v. Miss., G., & T. R. Co.*, 35 Ala. 33; *Macon & A. R. Co. v. Vason*, 57 Ga. 314; *Penobscot R. Co. v. Dummer*,

40 Me. 172; *Hughes v. Antietam Man. Co.*, 34 Md. 316. *Contra*, *Alabama & F. R. Co. v. Rowley*, 9 Fla. 508. A demand has been held necessary where the subscription is payable in work and materials. *Ohio, I., & I. R. Co. v. Cramer*, 23 Ind. 490.

³ *Goodrich v. Reynolds*, 31 Ill. 490; *New Albany & S. R. Co. v. Pickens*, 5 Ind. 247.

⁴ *Unthank v. Henry County Turnp. Co.*, 6 Ind. 125; *McCarty v. Selinsgrove & N. B. R. Co.*, 87 Pa. St. 332; *Banet v. Alton & S. R. Co.*, 13 Ill. 504; *Spangler v. Indiana & I. Cent. R. Co.*, 21 Ill. 276; *Wear v. Jacksonville & S. R. Co.*, 24 Ill. 593; *Tomlin v. Tonica & P. R. Co.*, 23 Ill. 429; *Macon & A. R. Co. v. Vason*, 57 Ga. 314; *Lackey v. Richmond & L. Turnp. Co.*, 17 B. Monr. 43; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Sands v. Sanders*, 26 N. Y. 239; *Scarlett v. Academy of Music*, 46 Md. 132.

⁵ *Miss., O., & R. R. R. Co. v. Gaster*, 20 Ark. 455; *Alabama & F. R. Co. v. Rowley*, 9 Fla. 508.

⁶ *Lexington & W. C. R. Co. v. Chandler*, 13 Met. 311; *Miss., O., & R. R. R. Co. v. Gaster*, 20 Ark. 455; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102.

⁷ *Hall v. United States Ins. Co.*, 5 Gill, 484.

⁸ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

availed of by a subscriber as a defence.¹ The statute may prescribe a notice as essential to a forfeiture of stock without requiring it to precede a suit for calls.²

Interest. — A subscriber is liable for interest from the time of his default.³

The Certificates; Tender; Effect of Holding. — The delivery of a certificate, or formal allotment of shares, to a subscriber is not necessary to hold him as such.⁴ The certificate is evidence of ownership, but is not essential to his title. It need not be tendered before suit is brought for the calls;⁵ but the company must be in a condition to issue the shares, and cannot maintain an action for the calls, if it has already issued the full number authorized by law.⁶ Where a subscriber agrees to pay for stock upon the delivery of a certificate to him, or upon the performance of a condition, the company must, in order to recover upon the agreement, prove a tender of the certificate.⁷ The subscriber is not entitled to a certificate without payment of all calls, including those barred by the Statute of Limitations.⁸ The possession of a certificate, or the record of a transfer on the company's books, is not necessary to hold a party as a stockholder in proceedings to subject him to liability for the debts of the corporation;⁹ but its possession is *prima facie* evidence of ownership.¹⁰

¹ White Mts. R. Co. v. Eastman, 34 N. H. 124.

² Lake Ontario, A., & N. Y. R. Co. v. Mason, 16 N. Y. 451; Heuston v. Cincinnati & F. W. R. Co., 16 Ind. 275, 281.

³ Gould v. Oneonta, 71 N. Y. 298, 3 Hun, 401; Southern Cent. R. Co. v. Moravia, 61 Barb. 180; Rikhoff v. Brown's Rotary S. S. M. Co., 68 Ind. 388; Upton v. Burnham, 3 Biss. 520. As to a contract to forbear a suit for calls, see Scarce v. Indiana & I. R. Co., 17 Ind. 193, 23 Ind. 223.

⁴ Danbury & N. R. Co. v. Wilson, 22 Conn. 435, 453; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Chester Glass Co. v. Dewey, 16 Mass. 94.

⁵ New Albany & S. R. Co. v. McCormick, 10 Ind. 499; Vawter v. Ohio & M. R. Co., 14 Ind. 174; Hardy v. Merriweather, 14 Ind. 203; Cincinnati, U., & Ft. W. R. Co. v. Pearce, 28 Ind. 502; Chandler v. Northern Cross R. Co., 18 Ill. 190; James v. Cincinnati, H., & D. R. Co., 2 Disney, 261; Buffalo & N. Y. City R.

Co. v. Dudley, 14 N. Y. 336; Smith v. Gower, 2 Duvall, 17; Fulgam v. Macon & B. R. Co., 44 Ga. 597; South Georgia & F. R. Co. v. Ayres, 56 Ga. 230. But the terms of the contract may require a tender as precedent to a suit for the amount. Courtright v. Deeds, 37 Iowa, 503.

⁶ McCord v. Ohio & M. R. Co., 13 Ind. 220.

⁷ Courtright v. Deeds, 37 Iowa, 503; Cooper v. McKee, 49 Iowa, 286; Clark v. Continental Improvement Co., 57 Ind. 135.

⁸ Johnson v. Albany & S. R. Co., 54 N. Y. 416.

⁹ Chaffin v. Cummings, 37 Me. 76, 83; Chesley v. Pierce, 32 N. H. 388, 402; Spear v. Crawford, 14 Wend. 20; Corwith v. Culver, 69 Ill. 502; Upton v. Burnham, 3 Biss. 431, 520; Upton v. Engelhart, 3 Dill. 496; Portal v. Emmens, L. R. 1 C. P. D. 201.

¹⁰ Courtright v. Deeds, 37 Iowa, 503; Sanger v. Upton, 91 U. S. 56.

Transfer of Shares; Effect on Liability for Calls.—A transfer of his share by a subscriber, in such form as to substitute the assignee in his place as a stockholder, releases the subscriber from subsequent calls, although he still remains liable for previous calls. When by the transfer he is released, the assignee, although holding the shares only as collateral security, becomes liable in his stead.¹ The assent of the corporation to the transfer is essential to the release of the original subscriber.² But a transfer, in order to relieve the prior stockholder, must be *bona fide* and without any secret trust in his favor; and it will be treated as only colorable when made to irresponsible parties in order to defeat creditors.³

Subscriptions, a Trust Fund.—The unpaid subscriptions are a trust fund for the payment of creditors; and releases and arrangements made by the directors with subscribers which are in fraud of their rights are void. Such subscriptions may be reached by the creditors in equity, and by assignees in bankruptcy and receivers.⁴ A stockholder is liable to creditors for the unpaid balance, although the certificate bears on its face the term “non-

¹ Huddersfield Canal Co. v. Buckley, 7 Term R. 36; Webster v. Upton, 91 U. S. 65; Pullman v. Upton, 96 U. S. 328; Moore v. Jones, 3 Woods, 53; Adderly v. Storm, 6 Hill, 624; Schenectady & S. Plank Road Co. v. Thatcher, 11 N. Y. 102; Empire City Bank, *In re*, 18 N. Y. 199; Isham v. Buckingham, 49 N. Y. 216; Cowles v. Cromwell, 25 Barb. 413; Allen v. Montgomery R. Co., 11 Ala. 437, 451; Hartford & N. H. R. Co. v. Boorman, 12 Conn. 530; Hall v. United States Ins. Co., 5 Gill, 484; Brigham v. Mead, 10 Allen, 245; Wheelock v. Kost, 77 Ill. 296; Curtis's Case, L. R. 6 Eq. Cas. 455; Heritage's Case, L. R. 9 Eq. Cas. 5; Angell & A. on Corp. § 534. In Seymour v. Sturges, 26 N. Y. 134, the purchaser of stock was held entitled to elect to pay the unpaid instalments or to forfeit his stock.

² Everhart v. Phil. & W. C. R. Co., 28 Pa. St. 339; Pittsburg & C. R. Co. v. Clarke, 29 Pa. St. 146; Graff v. Pittsburg & S. R. Co., 31 Pa. St. 489; Ryder v. Alton & S. R. Co., 13 Ill. 516; Allen v. Montgomery R. Co., 11 Ala. 437, 451; Gaff v. Fleisher, 33 Ohio St. 107.

³ Veiller v. Brown, 18 Hun, 571; Gaff v. Fleisher, 33 Ohio St. 107; Nathan v. Whitlock, 9 Paige, 152; Bowden v. Santos, 1 Hughes, 158.

⁴ Sawyer v. Hoag, 17 Wall. 610; Curran v. Arkansas, 15 How. 304; Ogilvie v. Knox Ins. Co., 22 How. 380; Upton v. Tribilcock, 91 U. S. 45; Sanger v. Upton, 91 U. S. 56; Webster v. Upton, 91 U. S. 65; Chubb v. Upton, 95 U. S. 665; Hatch v. Dana, 101 U. S. 205; Upton v. Hansbrough, 3 Biss. 417; Putnam v. New Albany, 4 Biss. 365; Payson v. Stoeber, 2 Dill. 427; Marsh v. Burroughs, 1 Woods, 463; Bowden v. Santos, 1 Hughes, 158; Bachman's Case, 12 Nat. Bank. Reg. 223; Bassett v. St. Alban's Hotel Co., 47 Vt. 313; Melvin v. Lamar Ins. Co., 80 Ill. 446, 459; Gaff v. Fleisher, 33 Ohio St. 107; Hightower v. Thornton, 8 Ga. 486; Dalton & M. R. Co. v. McDaniel, 56 Ga. 191; Osgood v. King, 42 Iowa, 478; Mann v. Cooke, 20 Conn. 178; Mann v. Pentz, 2 Sandf. Ch. 257; Sagory v. Dubois, 3 Sandf. Ch. 466; Mann v. Currie, 2 Barb. 294; Nathan v. Whitlock, 9 Paige, 152; Phoenix Warehousing Co., *In re*, 67 N. Y. 294, 6 Hun, 293; German-

assessable.”¹ The remedy of creditors is by a bill in equity rather than by a writ of mandamus requiring the directors to make calls.² They may pursue one or more delinquent subscribers without joining the whole number, and without an account being taken of other corporate indebtedness.³ But some authorities require a call or equivalent action, under the direction of the court, based on the indebtedness of the corporation, to precede a suit in favor of creditors.⁴ Innocent purchasers, in open market, of shares of stock issued by the corporation to subscribers who have not made legal payments therefor, are not liable to creditors, but the remedy of the latter is against the guilty parties only.⁵

Remedies against Subscribers.—The remedy of the company against a delinquent shareholder may be one or both of two different kinds,—by a sale of his share on his default, or by a suit at common law upon the subscription. It is usually provided in the charter or by some general law, that, in case of his default in paying his subscription, his share may be declared forfeited by the company, and sold. This special remedy is not exclusive, but only cumulative; and with great uniformity it is decided, that the shareholder is still liable on an express promise to pay the amount of his subscription.⁶ The express promise is founded on a

town Pass. R. Co. v. Fidler, 60 Pa. St. 124; Westchester & P. R. Co. v. Thomas, 2 Phil. 344; *ante*, p. 13. As to who are held as contributories under the English Winding-up Act, see Oakes v. Turquand, L. R. 2 H. L. 325; Mitchell v. City of Glasgow Bank, L. R. 4 App. Cas. 624; Houldsworth v. Glasgow Bank, L. R. 5 App. Cas. 317; Blyth's Case, L. R. 4 Ch. Div. 140; Clarke's Case, L. R. 8 Ch. Div. 635; British Nation Life Ass. Assoc., *In re*, 8 Ch. Div. 679; Wincham Shipbuilding, B. & S. Co., *In re*, L. R. 9 Ch. Div. 329; Esparto Trading Co., *In re*, L. R. 12 Ch. Div. 191; Stone v. City & County Bank, L. R. 3 C. P. Div. 282; *ante*, p. 44.

¹ Upton v. Burnham, 3 Biss. 520.

² Ward v. Griswoldville Man. Co., 16 Conn. 593, 601; Dalton & M. R. Co. v. McDaniel, 56 Ga. 191; Hatch v. Dana, 101 U. S. 205.

³ Hatch v. Dana, 101 U. S. 205.

⁴ Chandler v. Keith, 42 Iowa, 99; Chandler v. Siddle, 3 Dill. 477. See Sanger v. Upton, 91 U. S. 56.

⁵ Foreman v. Bigelow (U. S. C. C., D. Mass.), 7 Reporter, 137.

⁶ Worcester Turnp. Co. v. Willard, 5 Mass. 80; New Bedford & B. Turnp. Co. v. Adams, 8 Mass. 138; Middlesex Turnp. Co. v. Locke, 8 Mass. 268; Taunton & S. B. Turnp. Co. v. Whiting, 10 Mass. 327; Middlesex Turnp. Co. v. Swan, 10 Mass. 384; City Hotel of Worcester v. Dickinson, 6 Gray, 586; Boston, B. & G. R. Co. v. Wellington, 113 Mass. 79; New Hampshire Central R. v. Johnson, 30 N. H. 390; Contoocook Valley R. Co. v. Barker, 32 N. H. 363; White Mts. R. Co. v. Eastman, 34 N. H. 124; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Rutland & B. R. Co. v. Thrall, 35 Vt. 536; Connecticut & P. R. Co. v. Bailey, 24 Vt. 465; South Bay Meadow Dam Co. v. Gray, 30 Me. 547, 552; Kennebec & P. R. Co. v. Kendall, 31 Me. 470; Hartford & N. H. R. Co. v. Kennedy, 12 Conn. 499; Goshen Turnp. Co. v. Hurlin, 9 Johns. 217; Herkimer Man. & H. Co. v. Small, 21 Wend. 273; Troy Turnp. & R.

valid consideration; viz., the interest which the subscriber is thereby to receive in the stock of the company and in its profits.¹ The common-law remedy of a suit on an express promise contained in the subscription also exists where the charter declares that, upon the failure to pay the calls, "the stock shall be forfeited to the company with the instalments which may have been paid;"² and the same rule applies where the clause of forfeiture is inserted in the subscription, by the terms of which the non-payment is "on pain of forfeiting previous instalments."³

It is a question involving much conflict of judicial opinion, whether where the statute remedy of forfeiture is given, and the subscriber has made no express promise to pay assessments, and no personal liability to pay them is expressly imposed on him in the charter, they may be recovered of him in a suit upon an implied agreement to pay them. It was decided in Massachusetts at an early day that, in the absence of an express promise, an action could not be maintained on a mere agreement to take shares. It was considered that a corporation has no power at common law to make assessments on the corporators for its use; that where this power is given by statute, the general rule applies that when a statute gives a new power, and at the same time provides the means of executing it, those who assume to execute the power can execute it in no other way; and therefore where one simply engages to take, or, in other words, to

Co. v. M'Chesney, 21 Wend. 296; Northern R. Co. v. Miller, 10 Barb. 260; Troy & R. R. Co. v. Kerr, 17 Barb. 581; Ft. Edward & Ft. M. Plank Road Co. v. Payne, 17 Barb. 567; Troy & B. R. Co. v. Tibbitts, 18 Barb. 297, 300; Ogdensburgh, R., & C. R. Co. v. Frost, 21 Barb. 541; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 336; Klein v. Alton & S. R. Co., 13 Ill. 514; Peoria & O. R. Co. v. Elting, 17 Ill. 429; Stokes v. Lebanon & S. Turnp. Co., 6 Humph. 241; Greenville & C. R. Co. v. Cathcart, 4 Rich. 89; N. E. R. Co. v. Rodrigues, 10 Rich. 278; Beene v. Cahawba & M. R. Co., 3 Ala. 660; Selma & T. R. Co. v. Tipton, 5 Ala. 787; Allen v. Montgomery R. Co., 11 Ala. 437, 450; Freeman v. Winchester, 10 Smedes & M. 577; Instone v. Frankfort Bridge Co., 2 Bibb, 576; Canal Co. v. Samson, 1 Binney, 70; Barbee v. Jacksonville & A. Plank Road Co.,

6 Fla. 262; Kirksey v. Florida & G. Plank Road Co., 7 Fla. 23; Tar River Nav. Co. v. Neal, 3 Hawks, 520; Western R. Co. v. Avery, 64 N. C. 491; Hughes v. Antietam Man. Co., 34 Md. 316.

¹ Worcester Turnp. Co. v. Willard, 5 Mass. 86; Union Turnp. Co. v. Jenkins, 1 Caines, 381; Ft. Edward & Ft. M. Plank Road Co. v. Payne, 17 Barb. 567; Hamilton & D. Plank Road Co. v. Rice, 7 Barb. 164; Kennebec & P. R. Co. v. Palmer, 84 Me. 366; Kennebec & P. R. Co. v. Jarvis, 34 Me. 360; York & C. R. Co. v. Pratt, 40 Me. 447; Vermont Cent. R. Co. v. Claves, 21 Vt. 30; Danbury & N. R. Co. v. Wilson, 22 Conn. 435; Selma & T. R. Co. v. Tipton, 5 Ala. 787; Leviston v. Junction R. Co., 7 Ind. 597.

² Selma & T. R. Co. v. Tipton, 5 Ala. 787.

³ Troy Turnp. & R. Co. v. M'Chesney, 21 Wend. 296.

become the proprietor of, a certain number of shares without promising to pay assessments, there is no implied promise to pay them, and the only remedy of the corporation against him, when delinquent, is by a sale of his shares, as provided by the statute.¹ The rule as thus held is approved in Maine,² New Hampshire,³ and Vermont.⁴

The term "fill," in an agreement to "take and fill" a certain number of shares, is of the same import as the term "pay," and binds the subscriber personally.⁵ If the agreement admits a personal liability, and gives the corporation the right to enforce it by the usual means for enforcing contracts, such terms are treated as equivalent to an express promise.⁶ A promise to pay is not to be implied from conditions which do not contain words of promise.⁷ A provision of the charter making the subscriber liable for the balance remaining due after a sale of his shares does not, in the absence of an express promise, make him liable upon the subscription itself.⁸

The doctrine of the decisions in Massachusetts was rejected in Connecticut, where it was held that the taking of stock in a corporation creates a contract, express or implied, to pay for it as provided in the charter, which may be enforced like an express promise; and that this construction is demanded by the objects of the corporation, which can be successfully carried into effect only by the payment of the amount subscribed. The transaction between it and the subscriber was treated in effect as an offer on its part

¹ *Andover & M. Turnp. Co. v. Gould*, 6 Mass. 40; *Andover & M. Turnp. Co. v. Hay*, 7 Mass. 102; *New Bedford & B. Turnp. Co. v. Adams*, 8 Mass. 138; *Middlesex Turnp. Co. v. Swan*, 10 Mass. 384; *Franklin Glass Co. v. White*, 14 Mass. 286; *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Salem Mill Dam Co. v. Ropes*, 6 Pick. 23; *Ripley v. Sampson*, 10 Pick. 371; *Cutler v. Middlesex Factory Co.*, 14 Pick. 483; *Mechanics' Foundry & M. Co. v. Hall*, 121 Mass. 272; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Sedgwick on Statutory and Constitutional Law*, ch. viii. pp. 341-345.

² *Kennebec & P. R. Co. v. Kendall*, 31 Me. 470; *Jay Bridge Co. v. Woodman*, 31 Me. 573; *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561; *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185.

³ *Franklin Glass Co. v. Alexander*, 2 N. H. 380; *New Hamp. Cent. R. v. Johnson*, 30 N. H. 390, 403; *White Mts. R. Co. v. Eastman*, 34 N. H. 124; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491.

⁴ *Conn. & P. R. R. Co. v. Bailey*, 24 Vt. 465.

⁵ *Buckfield Branch R. Co. v. Irish*, 39 Me. 44; *Penobscot & K. R. Co. v. Dunn*, 39 Me. 587; *Penobscot R. Co. v. Dummer*, 40 Me. 172; *York & C. R. Co. v. Pratt*, 40 Me. 447; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244.

⁶ *Conn. & P. R. R. Co. v. Bailey*, 24 Vt. 465.

⁷ *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561; *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185.

⁸ *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561.

to sell him shares at a given price, and an acceptance of the same by him, which, by legal implication, amounts to a promise, and creates an obligation, on his part to pay the price agreed when lawfully required. The doctrine that where a new power is given by a statute, which also prescribes the mode of its execution, those who assume to exercise the power can exercise it in no other way, was regarded as inapplicable to beneficial statutes in civil cases. Regarding the power to sue as arising from the contract of subscription, this is not taken away by an affirmative statute giving an additional remedy.¹ The same view is adopted in New York, where the subscription is construed, even when a right of forfeiture is given to the company, to be a contract express or implied to pay for the stock, which may be enforced by suit as well as by the forfeiture;² and this doctrine is accepted in other States, where it is decided, in order to hold the subscriber, that it is only necessary that the writing should show an intention to become a stockholder, and the number of shares taken, if the terms of the subscription do not distinctly exclude personal liability.³

The personal liability of subscribers and of parties who received certificates, without making an express promise, has been enforced in favor of the creditors of an insolvent corporation.⁴

Even in those States in which an express promise is essential to a right of action, if the statute remedy of forfeiture is given, the subscriber will be personally liable if the charter provides the alternative remedies of a suit and of a forfeiture.⁵

¹ *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn. 499; *Mann v. Cooke*, 20 Conn. 178; *Danbury & N. R. Co. v. Wilson*, 22 Conn. 435.

² *Mann v. Currie*, 2 Barb. 294; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Northern R. R. Co. v. Miller*, 10 Barb. 260; *Troy & Boston R. Co. v. Tibbitts*, 18 Barb. 297, 300; *Ogdensburg, R., & C. R. Co. v. Frost*, 21 Barb. 541; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Rensselaer & W. Plank Road Co. v. Barton*, 16 N. Y. 457, note; *Dayton v. Borst*, 31 N. Y. 435; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, 6 Hun, 293. But see *Fort Edward & Ft. M. Plank Road Co. v. Payne*, 17 Barb. 567; *Seymour v. Sturges*, 26 N. Y. 134.

³ *Beene v. Cahawba & M. R. Co.*, 3 Ala. 660; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787; *Peoria & O. R. Co. v. Elting*, 17 Ill. 429, 432; *Kirksey v. Florida & G. Plank Road Co.*, 7 Fla. 23; *Fry v. Lexington & B. S. R. Co.*, 2 Met. (Ky.) 314; *Gill v. Kentucky & C. Gold & S. M. Co.*, 7 Bush, 635; *Busey v. Hooper*, 35 Md. 15.

⁴ *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *Chubb v. Upton*, 95 U. S. 665; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Mann v. Currie*, 2 Barb. 294; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, 6 Hun, 293. But see *Seymour v. Sturges*, 26 N. Y. 134.

⁵ *Kennebec & P. R. Co. v. Kendall*, 31

The right of the company to enforce a forfeiture is not treated as a pledge or mortgage; and its exercise operates as a satisfaction of the contract, and excludes the company from suing upon the subscriptions when the shares sell for less than their par value, and the subscriber from recovering the surplus if they sell for more than their par value.¹ But a mere threat of forfeiture, or unsuccessful attempt to sell the shares, will not deprive the company of the remedy by action.²

A subscriber ceases with the forfeiture to be a stockholder, and is not liable as such under statutes to creditors of the corporation, although the corporate debt was contracted before the forfeiture.³ The remedy upon an express promise may be enforced without first resorting to the remedy by forfeiture given by statute,⁴ or by the agreement.⁵ The subscriber may tender the amount at any time before the sale.⁶

The right may be given to a corporation, by statute, to recover after the forfeiture and sale the amount for which the share sells less than its par value.⁷ This right cannot be enforced without a formal declaration of a forfeiture, and the corporation cannot, after substituting other subscribers for those who fail to pay, recover of the original subscribers the difference between the amount subscribed and the amount realized upon a sale.⁸ It does not exist where the corporation has not complied with the conditions of the subscription.⁹ The power to declare a forfeiture of the shares for non-payment of calls is derived only from express statute provision, and usually depends on certain conditions, as a

Me. 470; Conn. & P. R. R. Co. v. Bailey, 24 Vt. 465; Fry v. Lexington & B. S. R. Co., 2 Met. (Ky.) 314.

¹ Small v. Herkimer Man. & H. Co., 2 N. Y. 330 (overruling 21 Wend. 273, and 2 Hill, 127); Northern R. Co. v. Miller, 10 Barb. 260, 277; Ogdensburg, R., & C. R. Co. v. Frost, 21 Barb. 543, 544; Buffalo & N. Y. City R. Co. v. Dudley, 14 N. Y. 386; Ashton v. Burbank, 2 Dill. 435; Rutland & B. R. Co. v. Thrall, 35 Vt. 536, 553; Macon & A. R. Co. v. Vason, 57 Ga. 314; Allen v. Montgomery R. Co., 11 Ala. 437.

² Instone v. Frankfort Bridge Co., 2 Bibb, 576; Macon & A. R. Co. v. Vason, 57 Ga. 314.

³ Mills v. Stewart, 41 N. Y. 384.

⁴ City Hotel v. Dickinson, 6 Gray,

586; New Hamp. Cent. R. Co. v. Johnson, 30 N. H. 390; Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Hughes v. Antietam Man. Co., 34 Md. 316.

⁵ Boston, B., & G. R. Co. v. Wellington, 113 Mass. 79.

⁶ Mitchell v. Vt. Copper Min. Co., 67 N. Y. 280, 40 N. Y. Superior, 406.

⁷ Danbury & N. R. Co. v. Wilson, 22 Conn. 435, 456; New Hamp. Cent. R. Co. v. Johnson, 30 N. H. 390; Agricultural Branch R. Co. v. Winchester, 13 Allen, 29.

⁸ Athol & E. R. Co. v. Prescott, 110 Mass. 213.

⁹ Belfast & M. L. R. Co. v. Cottrell, 66 Me. 185; Stoneham Branch R. Co. v. Gould, 2 Gray, 277.

prescribed notice and mode of sale. If these are not strictly complied with, or if the assessment itself is illegal, the sale will be void, and the shareholder will not be liable for the deficit.¹ Thus, the sale will be void where the notice does not purport to be given by the proper officer of the company,² or fails to state the place of sale,³ or where the sale is private and not at public auction as required,⁴ or is made for the payment of several assessments, one of which is illegal.⁵ The company is not required to declare a forfeiture on the subscriber's first default, but may defer the exercise of the power till the maturity of all the instalments.⁶

¹ *York & C. R. Co. v. Ritchie*, 40 Me. 425; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451; *Somerset R. Co. v. Clarke*, 61 Me. 379; *Belfast & M. L. R. Co. v. Cottrell*, 66 Me. 185; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Germanatown Pass. R. Co. v. Fitler*, 60 Pa. St. 124; *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275; *Downing v. Potts*, 3 Zab. 66; *Johnson v. Albany & S. R. Co.*, 40 How. Pr. 193; *Long Island R. Co., In re*, 19 Wend. 37; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. 155. In Vermont, a sale has been held not essential to a for-

feiture under the statute. *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536.

² *Portland, S., & P. R. Co. v. Graham*, 11 Met. 1.

³ *Lexington & W. C. R. Co. v. Staples*, 5 Gray, 520.

⁴ *Portland, S., & P. R. Co. v. Graham*, 11 Met. 1.

⁵ *Stoneham Branch R. Co. v. Gould*, 2 Gray, 277; *Lewey's Island R. Co. v. Bolton*, 48 Me. 451.

⁶ *Brockenbrough v. James River & K. Co.*, 1 Patton & H. (Va.) 94.

CHAPTER IV.

MUNICIPAL SUBSCRIPTIONS.

The Power to subscribe not an Ordinary Municipal Power.—Municipal corporations, as counties, cities, and towns, cannot by virtue of their ordinary powers, and without special authority of statute, subscribe for the stock of railroad companies, or aid them by grants or donations.¹ The power is derived only from express grant, and is not to be implied.²

Legislative Power to authorize Municipal Subscriptions.—The power of the legislature to confer the authority, where the Constitution is silent upon the subject, has been one of the most contested questions of constitutional law. Whether the amount subscribed or granted is to be raised by a tax or by a loan, the right to levy the tax immediately or ultimately is involved. The right to make the subscription or grant depends therefore on the right to levy a tax for the purpose.³

The power of taxation is subject to certain limitations inherent in the power itself, and binding on the legislature, even if they are not expressly declared in the Constitution. The legislature has a large and not easily defined discretion as to the objects to which it may be applied, but its discretion is not absolute and unlimited. A tax can be imposed only for a *public* purpose, or

¹ Thompson v. Lee County, 3 Wall. 327; Kenicott v. Supervisors, 16 Wall. 452; St. Joseph Township v. Rogers, 16 Wall. 644; South Ottawa v. Perkins, 94 U. S. 260, 262; Lewis v. Shreveport, 3 Woods, 205; People v. Mitchell, 35 N. Y. 551; Penn. R. Co. v. Philadelphia, 47 Pa. St. 189; Lamoille Valley R. Co. v. Fairfield, 51 Vt. 257; Lafayette v. Cox, 5 Ind. 38; Harvey v. Indianapolis, C., & D. R. Co., 32 Ind. 244; Lafayette, B., & M. R. Co. v. Geiger, 34 Ind. 85; Delaware County v. McClintock, 51 Ind. 325; Barnes v. Lacon, 84 Ill. 461; Jeffries v.

Lawrence, 42 Iowa, 498; Hasbrouck v. Milwaukee, 13 Wis. 37; M., O., & R. R. Co. v. Mayor, 23 Ark. 300; Brodie v. McCabe, 33 Ark. 690; French v. Teschemaker, 24 Cal. 518.

² Pitzman v. Freeburg, 92 Ill. 111; Sykes v. Columbus, 55 Miss. 115. See Gelpcke v. Dubuque, 1 Wall. 220; Meyer v. Muscatine, 1 Wall. 384; Rogers v. Bridgeport, 3 Wall. 654; Copes v. Charlestown, 10 Rich. 491.

³ Loan Association v. Topeka, 20 Wall. 655, 660; Lowell v. Boston, 111 Mass. 454, 460.

purpose of government. It cannot be laid for a private interest, or the mere benefit of individuals. The judicial department determines whether the purpose is a public one; and when it is judicially found to be of that character, the legislative department determines, in its discretion, the exigency which requires the tax, and the amount to be levied. Whether a purpose is to be regarded as public or not will depend much on the consideration whether it is one for which governments by long usage have provided, or one which is ordinarily left to private enterprise and liberality; but the decision must necessarily be largely influenced by the arguments of public policy which often govern jurists as well as statesmen.¹ If the object is in its essential character private, that is, one which concerns primarily the interest of individuals, it does not become public by reason of its incidental advantages to the community, however great they may be.² An object may also be a public use with reference to one power of government, as that of eminent domain, and be private as to another power, as that of taxation.³

The taxing power, being limited to public purposes, cannot be used to aid private manufacturing enterprises,⁴ or private educational institutions;⁵ to make loans to land-owners for rebuilding, where property has been destroyed by an extensive fire;⁶ to provide farmers, in case of a failure of crops, with grain for seed and feed;⁷ or to refund commutation money paid by drafted persons,⁸ — these objects being regarded as private in their character, although affecting a large number of persons.⁹

¹ *Loan Association v. Topeka*, 20 Wall. 655, 664; *People v. Salem*, 20 Mich. 452; *Cooley on Taxation*, ch. iv.

² *Lowell v. Boston*, 111 Mass. 454.

³ *People v. Salem*, 20 Mich. 452; *Cooley on Const. Lim.* 264, note. But see *Whiting v. Sheboygan & F. L. R. Co.*, 25 Wis. 167; *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147.

⁴ *Allen v. Jay*, 60 Me. 124; *Opinions of Judges*, 58 Me. 590; *Loan Association v. Topeka*, 20 Wall. 655; *C. B. U. R. Co. v. Smith*, 23 Kan. 745; *Commercial Bank v. Iola*, 2 Dill. 353; *Weisiner v. Douglass*, 64 N. Y. 1, 4 Hun, 201. See *Hackett v. Ottawa*, 99 U. S. 86; *Guernsey v. Burlington*, 4 Dill. 372.

⁵ *Curtis v. Whipple*, 24 Wis. 350; *Jenkins v. Andover*, 103 Mass. 94; *Phila.*

Assoc. v. Wood, 39 Pa. St. 78. See *Hensley Township v. People*, 84 Ill. 544.

⁶ *Lowell v. Boston*, 111 Mass. 454.

⁷ *State v. Osawkee*, 14 Kan. 418.

⁸ *Thompson v. Pittston*, 59 Me. 545; *Moulton v. Raymond*, 60 Me. 121.

⁹ It has been held constitutional to authorize towns and cities to give aid to State educational and reformatory institutions within their limits, or to a public grist-mill, or to subscribe for the stock of a turnpike company. *Merrick v. Amherst*, 12 Allen, 500; *Gordon v. Cornes*, 47 N. Y. 608; *Burlington v. Beasley*, 94 U. S. 310; *Livingston County v. Darlington*, 101 U. S. 407; *Commonwealth v. Williams*, 11 Pa. St. 61; *Clarke County v. Paris, W., & K. R. Turnp. Co.*, 11 B. Monr. 143.

A railroad owned and managed by individuals or by a private corporation is essentially private property, and a private interest, and, having that character, is not a purpose to which the taxing power can be properly applied.¹ It is removed in its essential character from public highways, which are maintained and used at will by the public. The corporation may indeed be put under special public supervision, and be required, as the consideration of the grant of its franchises, to perform certain duties to the public, — these being conditions which are at times imposed also on interests confessedly private; but it nevertheless remains a private enterprise created and carried on for the benefit of the owners, whether corporate or individual. According to these principles, the legislature of a State, without a special power given by its Constitution, cannot authorize municipalities to subscribe for the stock of railroad corporations or grant aid to them, or to issue bonds, obtain loans, and impose taxes for the purpose. This doctrine is held in Michigan;² it was held in Iowa, in decisions since overruled;³ it has been declared in numerous dissenting opinions; and it has been earnestly enforced by publicists against an accumulation of decisions.⁴ A system which puts the property of tax-paying citizens against their will into a railroad corporation is little better than confiscation. It has proved a

¹ *People v. Batchellor*, 53 N. Y. 128, 139, 140.

² *People v. Salem*, 20 Mich. 452; *Bay City v. State Treasurer*, 23 Mich. 499; *Thomas v. Port Hudson*, 27 Mich. 320. The question appears to be still open to controversy in New York. See *Williams v. Duanesburg*, 66 N. Y. 129; *Wellsboro' v. New York & C. R. Co.*, 76 N. Y. 182; *Sweet v. Hulbert*, 5 Barb. 312. The railroad, when owned by a private corporation, is regarded as an enterprise of a private character, and not justifying taxation in its behalf; but the Court of Appeals adopts the distinction, that, though the legislature may authorize, it cannot compel, the municipality to embark in the enterprise. *People v. Batchellor*, 53 N. Y. 128.

³ Such legislation was held constitutional in *Dubuque County v. Dubuque & P. R. Co.*, 4 Greene, 1 (1853); *State v. Bissell*, 4 Greene, 328 (1854); *Clapp v. Cedar County*, 5 Iowa, 15 (1857); *Ring v. Johnson*, 6 Iowa, 255 (1858); *McMil-*

len v. Boyles, 6 Iowa, 304 (1858); *McMillen v. Lee County*, 6 Iowa, 391 (1858). It was held unconstitutional in *Stokes v. Scott*, 10 Iowa, 166 (1859); *State v. Wapello*, 13 Iowa, 388 (1862); *Myers v. Johnson*, 14 Iowa, 47 (1862); *McMillan v. Boyles*, 14 Iowa, 107 (1862); *Rock v. Wallace*, 14 Iowa, 593 (1863); *Smith v. Henry County*, 15 Iowa, 385 (1863); *Ten Eyck v. Keokuk*, 15 Iowa, 486 (1863); *Chamberlain v. Burlington*, 19 Iowa, 395 (1865); *McClure v. Owen*, 26 Iowa, 243 (1868); *Hanson v. Vernon*, 27 Iowa, 29 (1869); and still later held constitutional in *Stewart v. Polk County*, 30 Iowa, 9 (1870); *McGregor v. Birdsall*, 32 Iowa, 149 (1871); *Jordan v. Hayne*, 36 Iowa, 9 (1872); *Muscatine Western R. Co. v. Horton*, 38 Iowa, 33; *Wapello v. B. & M. R. Co.*, 44 Iowa, 585; *Gelpcke v. Dubuque*, 1 Wall. 175; *King v. Wilson*, 1 Dill. 555.

⁴ *Cooley on Const. Lim.* pp. 261-266; *Dillon on Munic. Corp.* §§ 104, 105.

calamity in most instances, and has encouraged a spirit of repudiation in communities which have suffered from improvident investments.

The legislative power to impose taxes has not, however, been generally regarded as subject to these inherent limitations. The prevailing view may be stated as follows :¹ —

The legislature of a State, under the general grant of legislative power, may exercise all powers which are properly legislative, and not prohibited either expressly or by necessary implication, by the Constitution of the State or by that of the United States. Its authority has thus a double limitation. It cannot, in the first place, violate the fundamental law of the State or of the United States, either by usurping powers which the people have reserved to themselves, or which they have granted to the national government. In the second place, it cannot invade the co-ordinate departments of the State government, and, under color of making laws, usurp judicial functions. As a limitation of the latter class, its power to take the property of one citizen and give it to another has been denied, as being a judicial function.² It is, however, entitled to a liberal construction of its powers, and its acts should not be declared void by the judiciary, unless they are clearly in conflict with the prohibitions of the State or National Constitutions, either expressed or necessarily implied. The constitutionality of an act may be questionable ; but it is contrary to just principles of government for one department on doubtful implications to annul what another must be presumed to have established on settled conviction. The act may seem unwise and hostile to the general plan and spirit of the government ; but it is not within the province of the judiciary to pass upon the policy of statutes, or their consistency with any political theory. Considerations of public policy, except so far as they may serve to indicate the intention of the legislature, and aid in the interpretation of its acts, are to be addressed to that department alone.³

¹ The leading case in which the question was first elaborately discussed — the power of the legislature to authorize these municipal investments being sustained by a majority of the court against dissenting opinions — was that of *Sharpless v. Philadelphia*, 21 Pa. St. 147 (1853). For the dissenting opinions of Lowrie, J.,

& Lewis, J., see 2 Am. Law Reg. pp. 27, 85.

² *Sharpless v. Philadelphia*, 21 Pa. St. 160, 161, 169; *Cincinnati, W., & Z. R. Co. v. Clinton County*, 1 Ohio St. 77, 86; *Slack v. Maysville & L. R. Co.*, 13 B. Monr. 1, 22.

³ *Satterlee v. Matthewson*, 2 Peters,

The levying of taxes for the objects of the government is within the unquestionable scope of legislative power. The determination of what those objects shall be, and who shall bear the burden of the taxation, where there are no special constitutional limitations, belongs exclusively to the legislature.¹ It may levy taxes for public improvements, as highways, bridges, turnpikes, aqueducts; and it is within its discretion to determine how large a community is interested therein and ought to be taxed therefor. As a municipal corporation is a part of the government, its powers, in the absence of constitutional restrictions, may be abridged or enlarged by the legislature, and it may be authorized by that body to levy taxes for public purposes upon the property and persons within its limits.² And it is no objection to the validity of the tax that private individuals have already become personally liable for the improvements.³ The power of taxation may be abused, both in the objects for which, and the persons on whom, it is exercised; but the only remedy is with the people, who can change the legislature. It is, from its nature, unlimited in its extent, as the exigencies of the government cannot be prescribed in advance.⁴

The constitutional provision, "nor shall private property be taken for public use without just compensation," is not in conflict with the taxing power. This power has been considered as one entirely independent, and not contemplated in the constitutional prohibition.⁵ The payment of a tax is one's contribution of his share of the public burden; but when his property is taken in the exercise of the right of eminent domain, he contributes more than his share of the public burden, and is entitled to special compensation.⁶

380; *Calder v. Bull*, 3 Dall. 386; *Bennett v. Bogg*, 1 Baldwin, 74; *Wellington v. Petitioners*, 16 Pick. 95; *Commonwealth v. M'Williams*, 11 Pa. St. 61; *Police Jury v. M'Donough*, 8 La. An. 361; *Sharpless v. Philadelphia*, 21 Pa. St. 147, 164; *Booth v. Woodbury*, 32 Conn. 118.

¹ *People v. Brooklyn*, 4 N. Y. 419, 422, 426, 427; *Gordon v. Cornes*, 47 N. Y. 608; *McFerran v. Alloway*, 14 Bush, 580.

² *Norwich v. Hampshire*, 13 Pick. 60; *Shitz v. Berks*, 6 Barb. 80; *Cheaney v. Hooser*, 9 B. Monr. 330; *People v. Brooklyn*, 4 N. Y. 419; *Nichols v. Bridgeport*, 23 Conn. 189; *Moale v. Baltimore*, 5 Md. 314; *Commonwealth v. M'Williams*,

11 Pa. St. 61; *Williams v. Cammack*, 27 Miss. 209; *Williams v. Detroit*, 2 Mich. 560.

³ *Thomas v. Leland*, 24 Wend. 65; *Shaw v. Dennis*, 5 Gilman, 405.

⁴ *M'Culloch v. Maryland*, 4 Wheat. 428, 430; *Providence Bank v. Billings*, 4 Peters, 514, 561-563.

⁵ *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Booth v. Woodbury*, 32 Conn. 118; *Sharpless v. Philadelphia*, 21 Pa. St. 147, 166, 167; *Williams v. Cammack*, 27 Miss. 209; *Williams v. Detroit*, 2 Mich. 560; *Gilman v. Sheboygan*, 2 Black, 510.

⁶ *People v. Brooklyn*, 4 N. Y. 419, 422.

The implied limitations of the legislative department may be invoked to arrest a gross abuse of the taxing power; as where the community taxed can have no possible interest in the expenditures, and derive no possible benefit from them. To justify the interposition of the judiciary, however, in declaring a law enacted as a tax-law void, the tax must be for a purpose in which the community taxed has palpably no interest,—in a case where it is apparent that a burden is imposed for the benefit of others, and where it would be so pronounced at first blush.¹ But this principle does not require that the public improvement for which a community may be rightfully taxed shall lie entirely within its local limits. If it may fairly be supposed to be tributary in a special manner to the interests of the community, as by facilitating its commerce, it is a lawful subject of local taxation.²

Railroads are modern inventions; but they come legitimately within the designation of public improvements, designed to promote the general convenience and prosperity by furnishing means of internal communication. As such, the State may construct them itself, and, having the choice of means, may authorize and employ a private company to construct them, or, uniting with the company in the work, contribute to its capital stock, and raise money for the purpose by levying taxes on the local communities specially interested therein. The legislature, having the control of subordinate municipal organizations, and the power to enlarge or abridge their powers, may make them its instruments in carrying out this object, and may require or authorize them to make the subscription, and to levy taxes and issue bonds to pay the calls.³

Upon these considerations, municipal corporations—as towns, cities, and counties—have been held authorized, unless prohibited by the State Constitution, when acting by legislative authority, to subscribe to the stock of railroad companies, and for the purpose of raising money to meet the subscription, to issue

¹ *Cheaney v. Hooser*, 9 B. Monr. 330, 341–346; *Talbot v. Dent*, 9 B. Monr. 526; *Slack v. Maysville & L. R. Co.*, 13 B. Monr. 1, 31–33; *Sharpless v. Philadelphia*, 21 Pa. St. 147, 168.

² *Talbot v. Dent*, 9 B. Monr. 526, 535, 538; *Police Jury v. McDonogh*, 8 La. An. 341; *Sharpless v. Philadelphia*, 21 Pa. St. 147, 171; *Goddin v. Crump*, 8 Leigh, 120,

155; *Cincinnati, W., & Z. R. R. Co. v. Clinton County*, 1 Ohio St. 77, 98; *Nichol v. Nashville*, 9 Humph. 252.

³ *Cincinnati, W., & Z. R. Co. v. Clinton County*, 1 Ohio St. 77, 95–97; *Slack v. Maysville & L. R. Co.*, 13 B. Monr. 1, 22; *Louisville & N. R. Co. v. Davidson County*, 1 Sneed, 637, 666, 667; *Sharpless v. Philadelphia*, 21 Pa. St. 147, 169.

bonds and levy taxes on the persons and property within their limits.¹ The great number of the authorities, although generally

¹ *United States*: *Amey v. Allegheny City*, 24 How. 364; *Thomson v. Lee County*, 3 Wall. 327; *St. Joseph Township v. Rogers*, 16 Wall. 667, 1 Dill. 338; *Olcott v. Supervisors*, 16 Wall. 678.

Alabama: *Stein v. Mobile*, 24 Ala. 591; *Wetumpka v. Winter*, 29 Ala. 651; *Gibbons v. Mobile & G. N. R. Co.*, 36 Ala. 410; *Selma & G. R. R. Co., In re*, 45 Ala. 696; *Felder v. Montgomery & E. R. Co.*, 51 Ala. 178.

California: *Pattison v. Yuba County*, 13 Cal. 175; *Blanding v. Burr*, 13 Cal. 343; *Robinson v. Bidwell*, 22 Cal. 379; *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 435; *Stockton & V. R. R. Co. v. Stockton*, 41 Cal. 147.

Connecticut: *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Douglas v. Chatham*, 41 Conn. 211.

Florida: *Cotton v. Leon County*, 6 Fla. 610; *Columbia County v. King*, 13 Fla. 451.

Georgia: *Winn v. Macon*, 21 Ga. 275; *Powers v. Dougherty County*, 23 Ga. 65.

Illinois: *Prettyman v. Tazewell County*, 19 Ill. 406; *Johnson v. Stark County*, 24 Ill. 75; *Perkins v. Lewis*, 24 Ill. 208; *Butler v. Dunham*, 27 Ill. 474; *Piatt v. American Cent. R. Co.*, 29 Ill. 54; *Chicago, D., & V. R. Co. v. Smith*, 62 Ill. 268; *Quincy, M., & P. R. Co. v. Morris*, 84 Ill. 410. See *People v. Dupuyt*, 71 Ill. 651.

Indiana: *Aurora v. West*, 9 Ind. 74; *Lafayette, M., & B. R. Co. v. Geiger*, 34 Ind. 185; *John v. Cincinnati, R., & Ft. W. R. Co.*, 35 Ind. 539; *Petty v. Myers*, 49 Ind. 1; *Williams v. Hall*, 65 Ind. 129, 132; *Bittinger v. Bell*, 65 Ind. 445, 460.

Iowa: See *ante*, p. 89.

Kansas: *Burnes v. Atchison*, 2 Kan. 454; *Leavenworth County v. Miller*, 7 Kan. 479; *State v. Nemaha County*, 7 Kan. 542; *Morris v. Morris County*, 7 Kan. 576; *Leavenworth, L., & G. R. Co. v. Douglas County*, 18 Kan. 169.

Kentucky: *Talbot v. Dent*, 9 B. Monr. 526; *Slack v. Maysville & L. R. Co.*, 13 B. Monr. 1; *Maddox v. Graham*, 2 Met. 56; *Shelby County v. Cumberland & O. R. Co.*, 8 Bush, 209.

Louisiana: *Police Jury v. McDonogh*, 8 La. An. 341; *New Orleans v. Graihle*, 9 La. An. 561; *Parker v. Scogin*, 11 La. An. 629; *Vicksburg, S., & T. R. Co. v. Ouachita*, 11 La. An. 649.

Maine: *Augusta Bank v. Augusta*, 49 Me. 507.

Minnesota: *State v. Clark*, 23 Minn. 422; *Davidson v. Ramsey County*, 18 Minn. 432.

Mississippi: *Strickland v. Miss. R. Co.*, cited 27 Miss. 209, 224; *New Orleans, St. L., & C. R. Co. v. McDonald*, 53 Miss. 240.

Missouri: *St. Louis v. Alexander*, 23 Mo. 483; *St. Joseph & D. C. R. Co. v. Buchanan County*, 39 Mo. 485; *State v. Linn County Court*, 44 Mo. 504; *Osage Valley & S. K. R. Co. v. Morgan*, 53 Mo. 156; *Nicolay v. St. Clair County*, 3 Dill. 163.

Nebraska: *Hallenback v. Hahn*, 2 Neb. 377; *Reineman v. Covington, C., & B. H. R. Co.*, 7 Neb. 310.

Nevada: *Gibson v. Wason*, 5 Nev. 283.

New Hampshire: *Perry v. Keene*, 56 N. H. 514.

New York: *Bank of Rome v. Rome*, 18 N. Y. 38; *Starin v. Genoa*, 23 N. Y. 439, 29 Barb. 442; *Clarke v. Rochester*, 28 N. Y. 605, 24 Barb. 446, 13 How. Pr. 204; *Duanesburg v. Jenkins*, 57 N. Y. 177, 46 Barb. 294, 40 Barb. 574; *Williams v. Duanesburg*, 66 N. Y. 129; *Grant v. Courter*, 24 Barb. 232; *Benson v. Albany*, 24 Barb. 248; *People v. Henshaw*, 61 Barb. 409. But see *People v. Batchellor*, 53 N. Y. 128; *Sweet v. Hulbert*, 51 Barb. 312.

North Carolina: *Taylor v. Newberne*, 2 Jones Eq. 141; *Caldwell v. Burke County*, 4 Jones Eq. 323; *Hill v. Forsythe County*, 67 N. C. 367.

Ohio: *Cincinnati, W., & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Steubenville & I. R. Co. v. North Township*, 1 Ohio St. 105; *Cass v. Dillon*, 2 Ohio St. 607; *Thompson v. Kelly*, 2 Ohio St. 647; *Smead v. Union Township*, 8 Ohio St. 394; *Knox County v. Nichols*, 14 Ohio St. 260; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Walker v. Cincinnati*, 21 Ohio St. 14. But see *Griffith v. Crawford County*, 20 Ohio, 609, 622.

in support of the power, shows how questionable it has seemed to jurists, and how vigorously it has been contested.

Construction of State Constitutions and Statutes by the National Tribunals.—The Supreme Court of the United States will, as a general rule, follow the settled construction placed by the courts of a State upon its own Constitution and statutes, where no question arises under the National Constitution.¹ But it will not adhere to its own construction, which was contrary to one already given, without its knowledge, by the State court, and will, when the question again arises, follow the construction of the State court.² The decision of the State court overruling prior decisions is not to have a retroactive effect, so as to impair the obligation of a contract. Thus, if municipalities have obtained loans and issued bonds under legislation which the State court has held constitutional, a later decision of such court, holding the legislation unconstitutional, will not affect the validity of bonds issued under the earlier construction.³ The Supreme Court of the United States will follow the guidance of its own judgment where the State court has at different times come to opposite conclusions.⁴

Pennsylvania: Sharpless v. Philadelphia, 21 Pa. St. 147; Moers v. Reading, 21 Pa. St. 188; Thomas v. Allegheny County, 32 Pa. St. 218; Armstrong v. Perkins, 43 Pa. St. 400.

South Carolina: Copes v. Charleston, 10 Rich. 491.

Tennessee: Nichol v. Nashville, 9 Humph. 252; Louisville & N. R. Co. v. Davidson County Court, 1 Sneed, 637; Winston v. Tennessee & P. R. Co., 57 Tenn. 60.

Texas: San Antonio v. Jones, 28 Texas, 19; San Antonio v. Lane, 32 Texas, 405; San Antonio v. Gould, 34 Texas, 49.

Virginia: Goddin v. Crump, 8 Leigh, 120.

West Virginia: List v. Wheeling, 7 W. Va. 501.

Wisconsin: Clark v. Janesville, 10 Wis. 136; Bushnell v. Beloit, 10 Wis. 195; Phillips v. Albany, 28 Wis. 340; Rogan v. Watertown, 30 Wis. 259; Lawson v. Milwaukee & N. R. Co., 30 Wis. 597; Oleson v. Green Bay & L. P. R. Co., 36 Wis. 383; Supervisors v. Wisconsin Cent. R. Co., 121 Mass. 460. But see, *contra*, Foster v. Kenosha, 12 Wis. 616; Whiting v. She-

boygan & F. R. Co., 25 Wis. 167. See Kenosha v. Lamson, 9 Wall. 477; Olcott v. Supervisors, 16 Wall. 678.

The constitutionality of the legislation is assumed in Minnesota and West Virginia.

¹ Leffingwell v. Warren, 2 Black, 599; Supervisors v. United States, 18 Wall. 71, 82; Elmwood v. Marcy, 92 U. S. 289; Scipio v. Wright, 101 U. S. 665; King v. Wilson, 1 Dill. 555. See Roberts v. Bolles, 101 U. S. 119. Upon the question whether legislative action was such that a bill became a statute, it will follow the decision of the highest court of the State. South Ottawa v. Perkins, 94 U. S. 260.

² Fairfield v. Gallatin County, 100 U. S. 47.

³ Gelpcke v. Dubuque, 1 Wall. 175; Thomson v. Lee County, 3 Wall. 327; Butz v. Muscatine, 8 Wall. 575; Kenosha v. Lamson, 9 Wall. 477; Olcott v. Supervisors, 16 Wall. 678; Douglass v. Pike County, 101 U. S. 677; Williams v. Duaneburg, 66 N. Y. 129.

⁴ San Antonio v. Mehaffy, 96 U. S.

Vote of Citizens constitutional.—The submission by the legislature of the question, whether the subscription shall be made by a municipality, to a vote of the qualified voters, has been contested as an unauthorized delegation of legislative power, but such a submission has generally been held constitutional.¹

What constitutes a Majority.—Where a majority or other proportion of the legal voters is required for a subscription, a majority of those voting is presumed to be intended.²

Each Tax-payer allowed a Share.—A law authorizing the subscription by a municipal corporation to the stock of a railroad company is not unconstitutional, because it provides that a tax-payer shall be entitled to his *pro rata* share of the stock, and to a certificate therefor, when he shall have paid a certain amount of the tax. The provision is not open to the objection that it makes him a stockholder without his consent.³

State Constitutional Restrictions.—Several State Constitutions contain provisions concerning municipal investments in railroad and other similar corporations, either prohibiting them altogether, or restricting them as to the proportion of the popular vote required, and the limit of the amount which is to be calculated at a certain per cent on the valuation of the taxable property in the municipality.⁴ Constitutional provisions which prohibit or re-

312; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 432. See *Peck v. San Antonio*, 51 Texas, 490. But see *King v. Wilson*, 1 Dill. 555.

¹ *Talbot v. Dent*, 9 B. Monr. 526; *Slack v. Maysville & L. R. Co.*, 13 B. Monr. 1; *Moers v. Reading*, 21 Pa. St. 188; *Locke's Appeal*, 72 Pa. St. 491; *Cincinnati, W., & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Police Jury v. McDonough*, 8 La. An. 341; *Cotton v. Leon County*, 6 Fla. 610; *Louisville & N. R. Co. v. Davidson County Court*, 1 Sneed, 637; *St. Louis v. Alexander*, 23 Mo. 483; *Bank of Rome v. Rome*, 18 N.Y. 38; *Starin v. Genoa*, 23 N.Y. 439, 29 Barb. 442; *Gould v. Sterling*, 23 N.Y. 456; *Clarke v. Rochester*, 28 N.Y. 605, 24 Barb. 446; *Lafayette, M., & B. R. Co. v. Geiger*, 34 Ind. 185; *Patterson v. Yuba County*, 13 Cal. 175; *Blanding v. Burr*, 13 Cal. 343; *Hobart v. Butte County*, 17

Cal. 23; *Stein v. Mobile*, 24 Ala. 591. But see *Barto v. Himrod*, 8 N.Y. 483.

² *St. Joseph Township v. Rogers*, 16 Wall. 644; *Cass County v. Johnston*, 95 U.S. 360; *Cass County v. Jordan*, 95 U.S. 373; *Douglass v. Pike County*, 101 U.S. 677; *Reiger v. Beaufort*, 70 N.C. 319; *People v. Harp*, 67 Ill. 62; *Melvin v. Lisenby*, 72 Ill. 63; *Louisville & N. R. Co. v. Tennessee*, 8 Heisk. 663. But see *McWhorter v. People*, 65 Ill. 290; *People v. Chapman*, 66 Ill. 137; *Hawkins v. Carroll County*, 50 Miss. 735; *Woodson v. Brassfield*, 67 Mo. 331; *Webb v. Lafayette County*, 67 Mo. 353.

³ *Talbot v. Dent*, 9 B. Monr. 526; *Slack v. Maysville & L. R. Co.*, 13 B. Monr. 1; *Police Jury v. McDonough*, 8 La. An. 341, 360; *Cotton v. Leon County*, 6 Fla. 611.

⁴ See Constitutions (or recent amendments thereof) of New York, Pennsyl-

strict municipal investments in railroads are construed as prospective only, and not affecting previous special grants of authority.¹ A restriction which applies in terms to the State does not extend to its municipal subdivisions, which, notwithstanding the restriction, may be authorized by the legislature to make the investments.² A restriction on a county does not limit a city.³

A constitutional provision forbidding the legislature to authorize municipalities to become stockholders in corporations, or to loan their credit in aid of them, has been held not to prohibit an act authorizing municipalities to build and own a railroad in which they have a special interest, and to raise money by taxation, and issue bonds therefor.⁴

Modes and Extent of Aid, and Conditions to be observed.—A municipality may be authorized to aid a railroad lying partly or wholly outside of its limits, or even without the State.⁵ The aid may be in the form of a donation, subsidy, or loan of credit, as well as in that of a subscription for stock.⁶ Whether a particular

vania, Ohio, Illinois, Kentucky, Missouri, Mississippi, Minnesota, Nebraska, and West Virginia.

¹ *Cass v. Dillon*, 2 Ohio St. 607; *Thompson v. Kelly*, 2 Ohio St. 647; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *Callaway County v. Foster*, 93 U. S. 567; *Scotland County v. Thomas*, 94 U. S. 682; *Henry County v. Nicolay*, 95 U. S. 619; *Ray County v. Vansycle*, 96 U. S. 675; *Macon County v. Shores*, 97 U. S. 272, 278; *Schuyler County v. Thomas*, 98 U. S. 169; *Supervisors v. Galbraith*, 99 U. S. 214; *Fairfield v. Gallatin County*, 100 U. S. 147; *Slack v. Maysville & L. R. Co.*, 13 B. Monr. 1; *State v. Clark*, 23 Minn. 422; *State v. Sullivan County*, 51 Mo. 522; *Smith v. Clark County*, 54 Mo. 58; *State v. Green County*, 54 Mo. 540; *Dodge v. Platte County*, 16 Hun, 285. But see *Aspinwall v. Daviess County*, 22 How. 364; *List v. Wheeling*, 7 W. Va. 501; *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491. A general law prohibiting such investments has been held to repeal special acts. *Jeffries v. Lawrence*, 42 Iowa, 498.

² *Cass v. Dillon*, 2 Ohio St. 607; *Thompson v. Kelly*, 2 Ohio St. 647; *Prettyman v. Tazewell County*, 19 Ill.

406; *Robertson v. Rockford*, 21 Ill. 451; *People v. Chicago*, 51 Ill. 1, 34; *Slack v. Maysville & L. R. Co.*, 13 B. Monr. 1; *Clark v. Janesville*, 10 Wis. 137; *Bushnell v. Beloit*, 10 Wis. 195; *Aurora v. West*, 9 Ind. 74; *Leavenworth County v. Miller*, 7 Kan. 479; *Pattison v. Yuba County*, 13 Cal. 175; *New Orleans v. Graible*, 9 La. An. 561. But see *Bay City v. State Treasurer*, 23 Mich. 499; *Concord v. Portsmouth Savings Bank*, 92 U. S. 625.

³ *Thompson v. Peru*, 29 Ind. 305.

⁴ *Walker v. Cincinnati*, 21 Ohio St. 14, 1 Cincinnati Superior Court, 121. But see the construction given to this provision in *Taylor v. Ross County*, 23 Ohio St. 22.

⁵ *Burlington & M. R. R. Co. v. Otoe*, 16 Wall. 667; *Bell v. Mobile & O. R. Co.*, 4 Wall. 598; *Walker v. Cincinnati*, 21 Ohio St. 14; *St. Joseph & D. C. R. Co. v. Buchanan County*, 39 Mo. 485; *Quincy, M., & P. R. Co. v. Morris*, 84 Ill. 410; *McCallie v. Chattanooga*, 3 Head, 317; *Copes v. Charleston*, 10 Rich. 491; *Stein v. Mobile*, 24 Ala. 591.

⁶ *Burlington & M. R. R. Co. v. Otoe*, 16 Wall. 667; *Olcott v. Supervisors*, 16 Wall. 678; *Hamlin v. Mead-*

tax-payer is to be benefited by the scheme, is a legislative, and not a judicial question.¹ The enabling statute usually limits the amount and prescribes the terms of the bonds to be issued in payment; but, if it omits to do so, the municipality may exercise its discretion on these points.²

The legislature may confer the power to subscribe on a corporation hereafter to be created.³ It may confer upon some official board the power to determine whether a subscription shall be made for the municipality, without submitting the question to a popular vote.⁴ If it is a proper exercise of the taxing power for the legislature to authorize municipalities to invest in railways, it is likewise a proper exercise of that power to require them to do so, and to dispense with the consent of the citizens.⁵ But it has been held by some courts that, while the municipality can be authorized, it cannot be compelled to make such investments, and that the legislature cannot ratify subscriptions made without the consent of the tax-payers.⁶ As cities, towns, and counties are public corporations and a part of the machinery of the State, the power to compel and the power to authorize ought to be presumed to be coincident.

If the legislature cannot authorize a municipal investment in railroads without the consent of the tax-payers, it cannot, by a subsequent act, validate proceedings in which such consent is wanting.⁷ Municipal authorities, which have no original author-

ville, 6 Neb. 227; Chicago, D., & V. R. Co. v. Smith, 62 Ill. 268; Chicago & I. R. Co. v. Pinckney, 74 Ill. 277; Rogan v. Watertown, 30 Wis. 259; New Orleans, St. L., & C. R. Co. v. McDonald, 53 Miss. 240; Davidson v. Ramsey County, 18 Minn. 482; Stewart v. Polk County, 30 Iowa, 9. But see Whiting v. Sheboygan & F. L. R. Co., 25 Wis. 167; Sweet v. Hulbert, 51 Barb. 312. The term "donation" in a statute means an absolute gift without a consideration. Indiana, N., & S. R. Co. v. Attica, 56 Ind. 476; Wilkinson v. Peru, 61 Ind. 1. See Concord v. Portsmouth Savings Bank, 92 U. S. 625; Fairfield v. Gallatin County, 100 U. S. 47.

¹ McFerran v. Alloway, 14 Bush, 580.

² Niantic Savings Bank v. Douglas, 5 Brad. (Ill.) 579; United States v. Clark County, 96 U. S. 211.

³ James v. Milwaukie, 16 Wall. 159.

⁴ Keithsburg v. Frick, 34 Ill. 405;

Marshall v. Silliman, 61 Ill. 218; Quincy, M., & P. R. Co. v. Morris, 84 Ill. 410; Roberts v. Bolles, 101 U. S. 119; Milner v. Pensacola, 2 Woods, 632; Duaneburgh v. Jenkins, 57 N. Y. 177. See Williams v. Roberts, 88 Ill. 11; Richland County v. People, 3 Brad. (Ill.) 210; Perry v. Keene, 58 N. H. 40.

⁵ People v. Flagg, 46 N. Y. 401.

⁶ People v. Batchellor, 53 N. Y. 128; Williams v. Duaneburgh, 66 N. Y. 129; Horton v. Thompson, 71 N. Y. 513, 7 Hun, 452; Hardenbergh v. Van Keuren, 16 Hun, 17; Marshall v. Silliman, 61 Ill. 218; Barnes v. Lacon, 84 Ill. 461; Gaddis v. Richland County, 92 Ill. 119; Sykes v. Columbus, 55 Miss. 115; Allison v. Louisville, H. C., & W. R. Co., 10 Bush, 1.

⁷ People v. Batchellor, 53 N. Y. 128; Horton v. Thompson, 71 N. Y. 513; Hardenbergh v. Van Keuren, 16 Hun, 17; Marshall v. Silliman, 61 Ill. 218; Wiley v.

ity to make a subscription, cannot, by a ratification, give validity to their own unauthorized acts.¹ The State may, after a subscription has been authorized by a popular vote, and before it has been actually made, take away the power to subscribe. Such a repeal of authority, whether by a legislative act or constitutional amendment, does not impair the obligation of a contract, as no contract with the railroad company exists until the subscription has been made.² The agreement to take stock may, however, be made without a manual subscription, as by a resolution or vote of the municipal authorities which is designed to have that effect;³ but such vote or resolution, in order to be equivalent to a subscription, must be final in character, and be passed for the purpose of completing the agreement.⁴

The power to subscribe for the stock of railroad companies or otherwise to aid such enterprises being derived from statutes only, the terms of the statute must be followed.⁵ Thus the power to donate money and levy a tax for the purpose does not authorize the borrowing of money and issuing of bonds.⁶ The statute which confers the authority is to be construed reasonably.⁷ The authority to subscribe includes the power to issue bonds and to levy a tax.⁸ A company owning and working a narrow-gauge railroad,⁹ and a company owning and working a railroad and at the same time carrying on other kinds of business,¹⁰ are within the description of a railroad company contained in a statute

Silliman, 62 Ill. 170; *Elmwood v. Marcy*, 92 U. S. 289.

¹ *Marsh v. Fulton County*, 10 Wall. 676; *Mercer County v. Pittsburg & E. R. Co.*, 27 Pa. St. 389; *Lewis v. Shreveport*, 3 Woods, 205.

² *Aspinwall v. Daviess County*, 22 How. 364; *Concord v. Portsmouth Savings Bank*, 92 U. S. 625; *State v. Gar-route*, 67 Mo. 445; *List v. Wheeling*, 7 W. Va. 501; *Cumberland & O. R. Co. v. Washington County*, 10 Bush, 564; *Cumberland & O. R. Co. v. Barren County*, 10 Bush, 604. See *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491, 7 Hun, 499; *People v. Fort Edward*, 70 N. Y. 28; *State v. Lancaster County*, 6 Neb. 214.

³ *Nugent v. Supervisors*, 19 Wall. 241; *Moultrie County v. Rockingham Ten Cent Savings Bank*, 92 U. S. 631; *East Lincoln v. Davenport*, 94 U. S. 801; *Cass County v. Gillett*, 100 U. S. 585;

Clarke County v. Paris, W., & K. R. T. Co., 11 B. Monr. 143; *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313.

⁴ *Bates County v. Winter*, 97 U. S. 83.

⁵ *Gaddis v. Richmond County*, 92 Ill. 119; *People v. Jackson County*, 92 Ill. 441; *Daviess County v. Howard*, 13 Bush, 101; *Bell v. Mobile & O. R. Co.*, 4 Wall. 598; *Wellsboro' v. New York & C. R. Co.*, 76 N. Y. 182.

⁶ *Middleport v. Ætna Life Ins. Co.*, 82 Ill. 562; *Lippincott v. Pana*, 92 Ill. 24.

⁷ *Curtis v. Butler County*, 24 How. 435; *Woods v. Lawrence County*, 1 Black, 386.

⁸ *Seybert v. Pittsburg*, 1 Wall. 272; *United States v. New Orleans*, 98 U. S. 381; *United States v. Macon County*, 99 U. S. 582; *Hancock v. Chicot County*, 32 Ark. 575, 583.

⁹ *Meador v. Lowry*, 45 Iowa, 684.

¹⁰ *Randolph v. Post*, 93 U. S. 502. See *Kentucky Improvement Co. v. Slack*, 100 U. S. 648.

which authorizes municipal subscriptions to the stock of such companies.

The conditions and restrictions of the power to subscribe, as conferred by statute, must be fully complied with. If there is a failure in this regard, a mandamus will not be issued to compel the issue of the bonds,¹ and an injunction will be granted, on the petition of tax-payers, to restrain the municipality from making a subscription,² or to restrain the company from using the bonds, if already in their possession.³ A municipal corporation, like an individual, is not bound by its subscription, unless the conditions expressed therein are complied with.⁴ It may, however, waive the conditions, and a waiver has been implied from its delivery of its bonds to the company in payment of its subscription.⁵ A municipality, having legislative authority to make a subscription not exceeding a certain amount, does not exhaust its power by one subscription of a smaller sum, but may make additional subscriptions, amounting to an aggregate which does not exceed the legal limit.⁶ The rejection, by a popular vote, of a proposition to make a subscription duly authorized by the legislature, does not disable the municipality from submitting the proposition anew to the voters, whose affirmative action in the later vote will be valid.⁷

¹ *State v. Saline County*, 45 Mo. 242; *Springfield & I. S. R. Co. v. Cold Spring*, 72 Ill. 603; *Shelby County v. Cumberland & O. R. Co.*, 8 Bush, 209.

² *Mercer County v. Pittsburg & E. R. Co.*, 27 Pa. St. 390; *Harding v. Rockford, R. I., & St. L. R. Co.*, 65 Ill. 90; *Jackson County v. Brush*, 77 Ill. 59; *People v. Waynesville*, 88 Ill. 469; *People v. Spencer*, 55 N. Y. 1; *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491; *Wellsboro' v. New York & C. R. Co.*, 76 N. Y. 182; *Shelby County v. Cumberland & O. R. Co.*, 8 Bush, 209; *Mercer County v. Kentucky River Nav. Co.*, 8 Bush, 300; *Daviess County v. Howard*, 13 Bush, 101; *Lawson v. Schnellen*, 33 Wis. 288; *Wagner v. Meety*, 69 Mo. 150; *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625.

³ *Mercer County v. Pittsburg & E. R. Co.*, 27 Pa. St. 389.

⁴ *Bucksport & B. R. Co. v. Brewer*, 67 Me. 295; *Virginia & T. R. Co. v. Lyon County*, 6 Nev. 68; *Campbell County v.*

Knoxville & K. R. Co., 6 Cold. 598; *State v. Daviess County*, 64 Mo. 30; *Cooper v. Sullivan County*, 65 Mo. 542; *Wagner v. Meety*, 69 Mo. 150; *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491; *People v. Clayton*, 88 Ill. 45; *People v. Waynesville*, 88 Ill. 469; *Parker v. Smith*, 3 Brad. (Ill.) 356; *Bittinger v. Bell*, 65 Ind. 445 (distinguishing *Indiana, N., & S. R. Co. v. Attica*, 56 Ind. 476); *Merrill v. Welscher*, 50 Iowa, 61; *ante*, p. 56.

⁵ *Chiniquy v. People*, 78 Ill. 570; *Evansville, I., & C. S. R. Co. v. Evansville*, 15 Ind. 395; *Randolph County v. Post*, 93 U. S. 502; *Brooklyn v. Ætna Life Ins. Co.*, 99 U. S. 362. But see *Eagle v. Kohn*, 84 Ill. 292; *Parker v. Smith*, 3 Brad. (Ill.) 356.

⁶ *Empire v. Darlington*, 101 U. S. 87; *People v. Waynesville*, 88 Ill. 469.

⁷ *Society for Savings v. New London*, 29 Conn. 174; *Woodward v. Calhoun County* (U. S. D. C., N. D. Miss.), 2 Cent. Law Jour. 396.

Validity of Municipal Bonds.—If there is no authority to subscribe and issue bonds for the payment of a subscription, or conditions essential to the exercise of the power have not been complied with, the bonds will be void, even in the hands of a *bona fide* purchaser.¹ But if the power exists, and the only objection is that it has been defectively executed, as where there are mere irregularities in its exercise, or there is a mere failure to comply with conditions which are not essential to its existence, the municipality will be estopped from taking advantage of such omissions and defects in a suit upon bonds held by a *bona fide* owner. The authorities are, however, not uniform in distinguishing conditions and requirements which are essential, from those which are merely incidental and directory.²

¹ *Marsh v. Fulton County*, 10 Wall. 676; *Thomas v. Richmond*, 12 Wall. 349; *Elmwood v. Marcy*, 92 U. S. 289; *East Oakland v. Skinner*, 94 U. S. 255; *South Ottawa v. Perkins*, 94 U. S. 260; *McClure v. Oxford*, 94 U. S. 429; *Concord v. Portsmouth Bank*, 92 U. S. 625; *Anthony v. Jasper County*, 101 U. S. 693, 4 Dill. 136; *Chisholm v. Montgomery*, 2 Woods, 584; *Lewis v. Shreveport*, 3 Woods, 205; *Weismer v. Douglas*, 64 N. Y. 91; *Horton v. Thompson*, 71 N. Y. 513; *Hopple v. Brown Township*, 13 Ohio St. 311; *Beckle v. Union Township*, 15 Ohio St. 437; *Hopple v. Hipple*, 33 Ohio St. 116; *Clark v. Janesville*, 10 Wis. 136; *Rochester v. Alfred Bank*, 13 Wis. 432; *Berliner v. Waterloo*, 14 Wis. 378; *Burhop v. Milwaukee*, 21 Wis. 257; *Missouri River, F., & G. R. Co. v. Miami County*, 12 Kan. 230; *Steines v. Franklin County*, 48 Mo. 167; *Carpenter v. Lathrop*, 51 Mo. 483; *State v. Garroute*, 67 Mo. 445; *Wagner v. Meety*, 69 Mo. 150; *Sykes v. Columbus*, 55 Miss. 115; *Woodruff v. Okaloona*, 57 Miss. 806; *Clark v. Des Moines*, 19 Iowa, 199; *Williamson v. Keokuk*, 44 Iowa, 88; *Schuyler County v. Rock Island & A. R. Co.*, 25 Ill. 181; *Clarke v. Hancock County*, 27 Ill. 305; *Marshall County v. Cook*, 38 Ill. 44; *Force v. Batavia*, 61 Ill. 99; *Bissell v. Kankakee*, 64 Ill. 249; *Big Grove v. Wells*, 65 Ill. 263; *Ryan v. Lynch*, 68 Ill. 160; *Barnes v. Lacon*, 84 Ill. 461; *Williams v. Roberts*, 88 Ill. 11; *Lippincott v. Pana*, 92 Ill. 24, 2 Brad. (Ill.) 466; *Gaddis v. Richland County* (Ill. S.

C.), 12 Chicago Leg. News, 121; *Richland County v. People*, 3 Brad. (Ill.) 211; *Parker v. Smith*, 3 Brad. (Ill.) 356; *Delaware County v. McClintock*, 51 Ind. 325; *Hamlin v. Meadville*, 6 Neb. 227; *Hancock v. Chicot County*, 32 Ark. 575; *C., B., U., P. R. Co. v. Smith*, 28 Kan. 745.

² *Knox County v. Aspinwall*, 21 How. 539, 24 How. 376; *Bissell v. Jeffersonville*, 24 How. 287; *Amey v. Allegheny City*, 24 How. 364; *Wood v. Lawrence County*, 1 Black, 386; *Moran v. Miami County*, 2 Black, 722; *Mercer County v. Hackett*, 1 Wall. 83; *Gelpcke v. Dubuque*, 1 Wall. 175; *Meyer v. Muscatine*, 1 Wall. 384; *Rogers v. Burlington*, 3 Wall. 654; *Supervisors v. Schenck*, 5 Wall. 772; *Mayor v. Lord*, 9 Wall. 409; *Pendleton v. Amy*, 13 Wall. 297; *Lexington v. Butler*, 14 Wall. 282; *Grand Chute v. Winegar*, 15 Wall. 355; *Kenicott v. Supervisors*, 16 Wall. 452, 6 Biss. 138; *St. Joseph Township v. Rogers*, 16 Wall. 644; *Coloma v. Eaves*, 92 U. S. 484; *Venice v. Murdock*, 92 U. S. 494; *Converse v. Fort Scott*, 92 U. S. 503; *Marcy v. Oswego*, 92 U. S. 637; *Humboldt v. Long*, 92 U. S. 642; *Randolph v. Post*, 93 U. S. 502; *Leavenworth v. Barnes*, 94 U. S. 70; *Douglass County v. Bolles*, 94 U. S. 104; *Johnson County v. January*, 94 U. S. 202; *Marion County v. Clark*, 94 U. S. 278; *Johnson County v. Thayer*, 94 U. S. 631; *East Lincoln v. Davenport*, 94 U. S. 801; *Henry v. Nicolay*, 95 U. S. 619; *County Com'rs v. Chandler*, 96 U. S. 205; *United States v. Clark County*, 96 U. S.

Various Defences. — Collateral matters, as the irregular organization of the corporation, cannot be set up in defence to a suit upon the bonds.¹ Nor is it a defence, where the bonds were issued after the organization had been completed, that the corporation was not fully organized before the popular vote authorizing the subscription was taken.² A change of the corporate name does not affect the validity of the bonds.³ The acts of the corporation or its officers, which are illegal or *ultra vires*, are not a defence, as the municipality will have the remedies of a stockholder against them.⁴ Nor can the municipality set up in defence the acts of the corporation, enlarging or varying the enterprise by the lease or purchase of other railroads, or consolidations with other companies, which were done in pursuance of authority con-

211; *Rock Creek v. Strong*, 96 U. S. 271; *Ray v. Vansycle*, 96 U. S. 675; *Warren County v. Marcy*, 97 U. S. 96; *Daviess County v. Huidekoper*, 98 U. S. 98; *Weyauwega v. Ayling*, 99 U. S. 112; *Superior v. Galbraith*, 99 U. S. 214; *Brooklyn v. Ætna Life Ins. Co.*, 99 U. S. 362; *Cass County v. Gillett*, 100 U. S. 585; *Roberts v. Bolles*, 101 U. S. 119; *Gilchrist v. Little Rock*, 1 Dill. 261; *Muscataine v. M. & M. R. Co.*, 1 Dill. 536; *Nicolay v. St. Clair County*, 3 Dill. 163; *Pollard v. Pleasant Hill*, 3 Dill. 195; *Stanton v. Alabama & C. R. Co.*, 2 Woods, 523; *Young v. Montgomery & E. R. Co.*, 2 Woods, 606; *Milner v. Pensacola*, 2 Woods, 632; *Davis v. Kendallville*, 5 Biss. 280; *Bank of Rome v. Rome*, 19 N. Y. 20, 27 Barb. 65; *Hardenbergh v. Van Keuren*, 16 Hun, 17, 25; *Society of Savings v. New London*, 29 Conn. 174; *Deming v. Houlton*, 64 Me. 254; *Hamilton v. Pittsburg*, 34 Pa. St. 496; *Garrett v. Van Horne*, 7 Ohio St. 327; *Smead v. Union Township*, 8 Ohio St. 394; *Treadwell v. Hancock County*, 12 Ohio St. 596, 11 Ohio St. 183; *Goshen v. Shoemaker*, 12 Ohio St. 624, 14 Ohio St. 569; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Johnson v. Stark County*, 24 Ill. 75; *Clarke v. Hancock*, 27 Ill. 305; *Pratt v. American Cent. R. Co.*, 29 Ill. 54; *Keithsburg v. Frick*, 34 Ill. 405; *Mercer County v. Hubbard*, 45 Ill. 139; *People v. Cline*, 63 Ill. 394; *Maxey v. Williamson County*, 72 Ill. 207; *Morgan County v. Thomas*, 76 Ill. 120; *Burr v. Carbondale*, 76 Ill. 455; *Eagle v. Kohn*, 84 Ill. 292; *Niantic Savings Bank*

v. Douglass, 5 Brad. (Ill.) 579; *Ryan v. Varga*, 37 Iowa, 78; *Mt. Vernon v. Hovey*, 52 Ind. 563; *Wilkinson v. Peru*, 61 Ind. 1; *Flagg v. Palmyra*, 33 Mo. 440; *Hannibal & St. J. R. Co. v. Marion County*, 36 Mo. 294; *Barrett v. Schuyler County*, 44 Mo. 197; *Neal v. Saline County*, 48 Mo. 390; *Smith v. Clarke County*, 54 Mo. 58; *Hawkins v. Carroll County*, 50 Miss. 735; *Vicksburg v. Lombard*, 51 Miss. 111; *Clark v. Janesville*, 10 Wis. 136, 13 Wis. 414; *Bushnell v. Beloit*, 10 Wis. 195; *State v. Lime*, 23 Minn. 521; *San Antonio v. Lane*, 32 Tex. 405; *Board v. Texas & P. R. Co.*, 46 Tex. 316; *Louisville & N. R. Co. v. Tennessee*, 8 Heisk. 663; *Fielder v. Montgomery & E. R. Co.*, 51 Ala. 178; *Redd v. Henry County*, 31 Gratt. 695. But see *Aurora v. West*, 22 Ind. 88; *Veeder v. Lima*, 19 Wis. 280; *McPherson v. Foster*, 43 Iowa, 48; *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 456; *People v. Mead*, 24 N. Y. 114, 36 N. Y. 224; *Venice v. Woodruff*, 62 N. Y. 462 (overruled in 92 U. S. 494, 502, note); *Scipio v. Wright*, 101 U. S. 665.

¹ *Macon County v. Shores*, 97 U. S. 272; *Smith v. Clarke County*, 54 Mo. 58.

² *Daviess County v. Huidekoper*, 98 U. S. 98. But see *Ruby v. Shain*, 54 Mo. 207.

³ *Menasha v. Hazard*, 12 Chicago Leg. News, 329.

⁴ *People v. Logan County*, 63 Ill. 374; *Ottawa, O., & F. R. V. R. Co. v. Black*, 79 Ill. 262; *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313; *ante*, p. 65.

ferred by statutes which existed when the subscription was voted, or were afterwards enacted under a reserved power.¹ Oral misrepresentations made to voters on behalf of the company as to the route of the railroad are immaterial.² But an election carried by illegal votes will be a defence to a mandamus to compel a subscription in accordance with it.³

No formal acceptance by the company of the municipal subscription is required in order to bind the municipality. It is sufficient if the company complies with its terms.⁴

A municipality can vote a subscription only to the corporation authorized to receive it, and the subscription can be made only to the corporation designated in the vote;⁵ but the subscription may, after the vote has been taken, be made to a corporation into which the one named in the vote has been lawfully consolidated.⁶ The body with which the power to determine the subscription is lodged cannot delegate it.⁷ The subscription can be made only to the enterprise authorized by the statute; but the purpose of the statute will be considered in construing its terms.⁸

* **Defects cured by Legislation.** — Want of authority or defects in the proceedings may be cured by subsequent legislation.⁹ The

¹ *Nugent v. Supervisors*, 19 Wall. 241, 3 Biss. 105; *Scotland County v. Thomas*, 94 U. S. 682; *East Lincoln v. Davenport*, 94 U. S. 801; *Cass County v. Jordan*, 95 U. S. 373; *Henry County v. Nicolay*, 95 U. S. 619; *Schuyler County v. Thomas*, 98 U. S. 169; *Wilson v. Salamanca*, 99 U. S. 499; *Empire v. Darlington*, 101 U. S. 87; *Menasha v. Hazard*, 12 Chicago Leg. News, 329; *State v. Greene County*, 54 Mo. 540; *Robertson v. Rockford*, 21 Ill. 451; *People v. Logan County*, 63 Ill. 374; *Ottawa, O., & F. R. V. R. Co. v. Black*, 79 Ill. 262; *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313; *Edwards v. People*, 88 Ill. 340; *Lippincott v. Pana*, 92 Ill. 24, 2 Brad. (Ill.) 466; *Niantic Savings Bank v. Douglass*, 5 Brad. (Ill.) 579; *Mt. Vernon v. Hovey*, 52 Ind. 563. But see *State v. Nemaha County*, 10 Kan. 569; *Harshman v. Bates County*, 92 U. S. 569, 3 Dill. 150; *State v. Garroutte*, 67 Mo. 445; *Wagner v. Meety*, 69 Mo. 150; *ante*, pp. 66-74.

² *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313.

³ *People v. Logan County*, 63 Ill. 374.

But see *State v. Lake City*, 25 Minn. 404.

⁴ *State v. Lime*, 23 Minn. 521; *State v. Hastings*, 24 Minn. 78.

⁵ *Big Grove v. Wells*, 65 Ill. 263; *McWhorter v. People*, 65 Ill. 290; *Bell v. Mobile & O. R. Co.*, 4 Wall. 598; *Marsh v. Fulton County*, 10 Wall. 676; *New Albany v. Burke*, 11 Wall. 96; *Bates County v. Winters*, 97 U. S. 83; *Fulton County v. Mississippi & W. R. Co.*, 21 Ill. 338. See *Ray County v. Vansycle*, 96 U. S. 675.

⁶ See cases cited *supra*, note 1.

⁷ *Monadnock R. Co. v. Peterborough*, 49 N. H. 281; *Mercer County v. Pittsburg & E. R. Co.*, 27 Pa. St. 389.

⁸ *Van Hostrup v. Madison City*, 1 Wall. 291; *State v. Hastings*, 24 Minn. 78; *Parker v. Smith*, 3 Brad. (Ill.) 356.

⁹ *Bissell v. Jeffersonville*, 24 How. 287; *Thomson v. Lee County*, 3 Wall. 327; *Campbell v. Kenosha*, 5 Wall. 194; *Lee County v. Rogers*, 7 Wall. 181; *Beloit v. Morgan*, 7 Wall. 619; *City v. Lamson*, 9 Wall. 477; *St. Joseph Township v. Rog-*

conditions may be changed or waived by the legislature even pending litigation.¹ The legislature may, by a subsequent act of ratification, give validity to a subscription which the municipality had not the power at the time to make;² but it cannot give validity to an illegal subscription, if, prior to the ratifying act a constitutional provision forbidding such investments has taken effect.³ Some authorities hold that it cannot by a ratification give validity to subscriptions which are void for want of compliance with the statute.⁴

Congress may by a ratifying act give validity to the unauthorized proceedings of a municipal corporation of a Territory in voting a subscription to the stock of a railroad company.⁵

Estoppel. — The municipality is estopped from setting up the invalidity of its bonds while it retains the stock which was issued in exchange for them.⁶ The fraud or misconduct of agents of the corporation,⁷ or of public officers by whom the bonds were issued,⁸ is not a defence to a suit by a *bona fide* bondholder. The

ers, 16 Wall. 644; *South Ottawa v. Perkins*, 94 U. S. 260; *Dallas County v. MacKenzie*, 94 U. S. 660; *Bates County v. Winters*, 97 U. S. 83; *Putnam v. New Albany*, 4 Biss. 365; *People v. Mitchell*, 35 N. Y. 551, 45 Barb. 208; *Duanesburg v. Jenkins*, 57 N. Y. 177, 46 Barb. 294, 40 Barb. 574; *Williams v. Duanesburg*, 66 N. Y. 127; *Rogers v. Smith*, 5 Hun. 475; *Alexander v. McDowell County*, 70 N. C. 208; *Shelby County v. Cumberland & O. R. Co.*, 8 Bush, 209; *Redd v. Henry County*, 31 Gratt. 695; *Keithsburg v. Frick*, 34 Ill. 405; *Copes v. Charleston*, 10 Rich. 491; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Sykes v. Columbus*, 55 Miss. 115. See *ante*, p. 97.

¹ *Duanesburg v. Jenkins*, 57 N. Y. 177; *People v. Clark*, 53 Barb. 171. But see *Columbus, C., & I. C. R. Co. v. Grant County*, 65 Ind. 427.

² *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Shelby County v. Cumberland & O. R. Co.*, 8 Bush, 209; *Campbell v. Kenosha*, 5 Wall. 194; *Ritchie v. Franklin County*, 22 Wall. 67; *Keithsburg v. Frick*, 34 Ill. 405; *Copes v. Charleston*, 10 Rich. 491.

³ *Sykes v. Columbus*, 55 Miss. 115; *People v. Jackson County*, 92 Ill. 441;

Richland County v. People, 3 Brad. (Ill.) 210.

⁴ *Marshall v. Silliman*, 61 Ill. 218; *Wiley v. Silliman*, 62 Ill. 170; *Barnes v. Lacon*, 84 Ill. 461; *Williams v. Roberts*, 88 Ill. 11; *Gaddis v. Richland County*, 92 Ill. 119; *Richland County v. People*, 3 Brad. (Ill.) 210; *Elmwood v. Marcy*, 92 U. S. 289.

⁵ *National Bank v. Yankton County*, 101 U. S. 129.

⁶ *Munson v. Lyons*, 12 Blatch. 539; *Whiting v. Potter* (U. S. C. C., N. D. N. Y., May, 1880), 2 Fed. Rep. 517. But see *Horton v. Townsend*, 71 N. Y. 513, 524.

⁷ *East Lincoln v. Davenport*, 94 U. S. 801; *Macon County v. Shores*, 97 U. S. 272. Compare *State v. Lake City*, 25 Minn. 404. See as to fraud in influencing votes at the voting upon such subscriptions, *Butler v. Dunham*, 27 Ill. 474; *Sinnett v. Moles*, 38 Iowa, 25; *Platteville v. Galena & S. W. R. Co.*, 43 Wis. 493; *Leavenworth, L., & G. R. Co. v. Douglass County*, 18 Kan. 169.

⁸ *Cromwell v. Sac County*, 96 U. S. 51, 94 U. S. 351; *Smith v. Sac County*, 11 Wall. 139; *Cass County v. Green*, 66 Mo. 498.

officers of a municipality who have as its agents received its funds to pay the interest on its bonds, cannot contest their legality, even though at the time acting under the instructions of a town meeting.¹

Conclusive Acts and Certificates.—The certificates or acts and decisions of certain public officers, boards, and tribunals may by statutes be made conclusive proof that proper legal steps have been taken in order to make a valid subscription; and they will exclude inquiry into such matters in suits upon the bonds.² A similar effect, where the power to subscribe exists, has been given to recitals in the bond itself when made by an officer or board authorized to decide whether the conditions precedent to a lawful issue have been complied with.³ If the bond recites that it is issued for a municipal purpose, the city cannot set up that it was issued for a different and unauthorized purpose.⁴ The recital will have, it has been held, no effect where the power to subscribe does not exist.⁵ The recitals of the bonds themselves may be such as to affect the public with notice of their invalidity.⁶ The doctrine of constructive notice arising from *lis pendens* does not apply to such negotiable securities, purchased before maturity.⁷

¹ *Ross v. Curtiss*, 31 N. Y. 606; *People v. Mead*, 36 N. Y. 224; *People v. Brown*, 55 N. Y. 180, 187; *First National Bank v. Wheeler*, 72 N. Y. 201.

² *Knox County v. Aspinwall*, 21 How. 539; *Mercer County v. Hackett*, 1 Wall. 83; *Grand Chute v. Winegar*, 15 Wall. 355; *Lynde v. Winnebago County*, 16 Wall. 6; *Kenicott v. Supervisors*, 16 Wall. 452; *Rock Creek v. Strong*, 96 U. S. 271; *Macon County v. Shores*, 97 U. S. 272, 279; *Block v. Com'rs*, 99 U. S. 686; *Munson v. Lyons*, 12 Blatch. 539; *Ballou v. Jasper County* (U. S. C. C., S. D. Ill.), 3 Fed. Rep. 620, 10 Reporter, 449; *Bank of Rome v. Rome*, 19 N. Y. 20; *People v. Mitchell*, 35 N. Y. 551, 45 Barb. 208; *State v. Hancock County*, 12 Ohio St. 596; *Evansville, I., & C. S. R. Co. v. Evansville*, 15 Ind. 395.

³ *Moran v. Com'rs*, 2 Black, 722; *Colona v. Eaves*, 92 U. S. 484; *Marcy v. Oswego*, 92 U. S. 637; *Douglas County v. Bolles*, 94 U. S. 104; *Johnson County v. January*, 94 U. S. 202; *San Antonio v. Mehaffy*, 96 U. S. 312, 51 Tex. 490; *War-*

ren County v. Marcy, 97 U. S. 96; *Daviess County v. Huidekoper*, 98 U. S. 98; *Wilson v. Salamanca*, 99 U. S. 499; *Supervisors v. Galbraith*, 99 U. S. 214; *Orleans v. Platt*, 99 U. S. 676; *Hackett v. Ottawa*, 99 U. S. 86; *Pompton v. Cooper Union*, 101 U. S. 196; *Menasha v. Hazard*, 12 Chicago Leg. News, 329; *Dodge v. Platte County*, 16 Hun, 285, 290; *Smith v. Clark County*, 54 Mo. 58. *Contra*, *Woodruff v. Okaloona*, 57 Miss. 806.

⁴ *Hackett v. Ottawa*, 99 U. S. 86.

⁵ *Barnes v. Lacon*, 84 Ill. 461; *Williams v. Roberts*, 88 Ill. 1; *Lippincott v. Pana*, 92 Ill. 24, 2 Brad. (Ill.) 466.

⁶ *Harshman v. Bates County*, 92 U. S. 569; *McClure v. Oxford*, 94 U. S. 429; *Bates County v. Winters*, 97 U. S. 83; *Lewis v. Barbour County* (U. S. C. C., D. Kan.), 3 Fed. Rep. 191. See *Wilson v. Salamanca*, 99 U. S. 499.

⁷ *Warren County v. Marcy*, 97 U. S. 96; *Cass County v. Gillett*, 100 U. S. 585. See *Diamond v. Lawrence County*, 37 Pa. St. 358; *Lee County v. Rogers*, 7 Wall. 181.

Mandamus. — The writ of mandamus is the appropriate remedy of the railroad corporation to compel municipal officers to comply with the requirements of the statute authorizing a municipal subscription.¹ It is the remedy of a holder of municipal bonds for enforcing the municipal obligation to provide means by taxation for paying the interest and principal as each becomes due.² The relator must clearly establish his right, or the writ will not be granted.³

Mandamus issued by the National Courts. — The Circuit Courts of the United States, in suits pending in them, will issue the writ of mandamus commanding the proper local officers of the State to assess and collect a tax for the satisfaction of judgments rendered in said courts on municipal bonds, and an injunction from a State court is not a sufficient answer to the writ;⁴ but they will not, on account of the evasions of duty by the local authorities, appoint officers of their own to assess and collect the tax.⁵

¹ *Cincinnati, W., & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Clarke County v. Paris, W., & K. R. Turnpike Co.*, 11 B. Monr. 143; *Cumberland & O. R. Co. v. Washington County*, 10 Bush, 564; *Louisville & N. R. Co. v. Davidson County*, 1 Sneed, 637; *People v. Mitchell*, 35 N. Y. 551; *Howland v. Eldredge*, 43 N. Y. 457; *People v. Allen*, 52 N. Y. 538; *Selma & G. R. Co., In re*, 45 Ala. 696; *People v. Logan County*, 63 Ill. 374; *People v. Glann*, 70 Ill. 232; *People v. Cass County*, 77 Ill. 438; *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313; *Napa Valley R. Co. v. Napa County*, 30 Cal. 435. But see *Crawford County v. Louisville, N. A., & St. L. A. L. R. Co.*, 39 Ind. 192; *Sankey v. Terre Haute & S. W. R. Co.*, 42 Ind. 402; *Mt. Vernon v. Hovey*, 52 Ind. 563; *Jager v. Doherty*, 61 Ind. 528; *Bittinger v. Bell*, 65 Ind. 445; *People v. Batchellor*, 53 N. Y. 128; *C., D., & M. R. Co. v. Olmstead*, 46 Iowa, 316.

² *Commonwealth v. Allegheny County*, 32 Pa. St. 218; *Commonwealth v. Pittsburg*, 34 Pa. St. 496; *Commonwealth v. Allegheny County*, 37 Pa. St. 237; *Commonwealth v. Pittsburg*, 43 Pa. St. 391; *Commonwealth v. Perkins*, 43 Pa. St. 400; *Clarke County v. Paris, W., & K. R. Turnp. Co.*, 11 B. Monr. 143; *Maddox v. Graham*, 2 Met. (Ky.) 56;

Shelby County v. Cumberland & O. R. Co., 8 Bush, 209; *McLendon v. Anson County*, 71 N. C. 38; *Limestone County v. Rather*, 48 Ala. 433; *Flagg v. Palmyra*, 33 Mo. 440; *Columbia County v. King*, 13 Fla. 452; *Hopple v. Brown Township*, 13 Ohio St. 311.

³ *People v. Oldtown*, 88 Ill. 202.

⁴ *Knox County v. Aspinwall*, 24 How. 376; *Supervisors v. United States*, 4 Wall. 435; *Von Hoffman v. Quincy*, 4 Wall. 535; *Riggs & Johnson County*, 6 Wall. 166; *Weber v. Lee County*, 6 Wall. 210; *United States v. Keokuk*, 6 Wall. 514, 518; *Supervisors v. Rogers*, 7 Wall. 175; *Butz v. Muscatine*, 8 Wall. 575; *Mayor v. Lord*, 9 Wall. 409; *Supervisors v. Durant*, 9 Wall. 415; *Cass County v. Johnston*, 95 U. S. 360; *United States v. Clark County*, 96 U. S. 211; *United States v. New Orleans*, 98 U. S. 381; *Welch v. Ste. Genevieve*, 1 Dill. 130; *Lansing v. County Treasurer*, 1 Dill. 522; *Muscatine v. Miss. & M. R. Co.*, 1 Dill. 536; *Rusch v. Des Moines County*, *Woolworth*, 313; *United States v. Badger*, 6 Biss. 308; *Sibley v. Mobile*, 3 Woods, 535; *Brodie v. McCabe*, 33 Ark. 690.

⁵ *Rees v. Watertown*, 19 Wall. 107; *Heine v. Levee Com'rs*, 19 Wall. 655, 1 Woods, 246.

They will not issue the writ to compel municipal officers to do acts which they are not authorized to do by the laws of the State.¹

Injunction against Issue of Bonds and Collection of Tax.—The municipal corporation may be enjoined at the suit of tax-payers from making illegal subscriptions, and issuing bonds or raising money by taxation therefor.² After the bonds have been issued, the injunction will be granted only when the municipality has a valid defence to them.³ A court of equity may, on a proper case shown, decree the cancellation of municipal bonds illegally issued.⁴

Remedies against Municipality.—A municipal corporation, having received the money on bonds which have been held void for mere want of power to issue them, ought in justice to refund the amount, and it is liable therefor to a *bona fide* bondholder in an action for money had and received.⁵ While the doctrine of *ultra vires* may be admitted with more reason as a defence in the case of municipal than of private corporations, it is, even as to the former, one which ought to be confined within narrow limits. If tax-paying citizens fail to resort to preventive remedies, and allow bonds to be issued, and the proceeds paid into the municipal treasury, a rule of law which permits the municipal corporation to repudiate its promise, while it retains the consideration, violates the fundamental principles

¹ *Supervisors v. United States*, 18 Wall. 71; *United States v. Clark County*, 96 U. S. 211; *United States v. Macon County*, 99 U. S. 582.

² *Chestnutwood v. Hood*, 68 Ill. 132; *Campbell v. Paris & D. R. Co.*, 71 Ill. 611; *Wright v. Bishop*, 88 Ill. 302; *New Orleans, M., & C. R. Co. v. Dunn*, 51 Ala. 128; *Redd v. Henry County*, 31 Gratt. 695; *Winston v. Tennessee & P. R. Co.*, 1 Baxter (Tenn.), 60; *Nefzger v. Davenport & St. P. R. Co.*, 36 Iowa, 642; *Delaware County v. McClintock*, 51 Ind. 325. But the tax-payer cannot, where the collection of the tax might have been resisted, recover the amount of the municipal treasurer after it has been collected and paid to the railroad company. *Butler v. Fayette County*, 46 Iowa, 326. The

railroad company has been held in Indiana not to be a proper party defendant to the proceeding. *Jager v. Doherty*, 61 Ind. 528; *Bittinger v. Bell*, 65 Ind. 445.

³ *Wilkinson v. Peru*, 61 Ind. 1.

⁴ *Springport v. Teutonia Savings Bank*, 75 N. Y. 397 (distinguishing *Venice v. Woodruff*, 62 N. Y. 462).

⁵ *Dill v. Wareham*, 7 Met. 438; *Argenti v. San Francisco*, 16 Cal. 255; *Paul v. Kenosha*, 22 Wis. 266; *Wapello County v. B. & M. R. Co.*, 44 Iowa, 585; *Marsh v. Fulton County*, 10 Wall. 676. See *Herzo v. San Francisco*, 33 Cal. 134; but, *contra*, where the contract is prohibited by a penal law, or founded on an immoral consideration, *Thomas v. Richmond*, 12 Wall. 349.

of morality and good government. A bond issued by a public authority ought to be the symbol of faith and honor.¹

The rights of creditors are not affected by amendments of municipal charters, or the substitution of a new charter for the old one, where the substantial identity of the corporation is preserved.² They survive in case of the extinction of the municipal body by legislative act against the municipal corporation in which it has been merged, at least to the extent to which the latter has succeeded to the property of the former.³

A municipality may, under an appropriate statute provision, have an equitable lien on the earnings of a corporation to which it has made a loan.⁴

Bonds and Coupons. — Bonds with coupons payable to bearer, though under seal, are negotiable and pass by delivery, and in the hands of *bona fide* holders are not subject to the equities between the original parties.⁵ They may be sued by the holder in his own name.⁶ Coupons are suable without the production of the bonds,⁷ and the Statute of Limitations begins to run on each coupon upon its maturity.⁸ A coupon, it has been held, is only negotiable when it contains apt words on its face, giving it that character.⁹ The *bona fide* holder may recover the full amount of the bond, although he paid a less sum for it.¹⁰ The fact that a coupon is overdue and unpaid does not affect the position of one who is a *bona fide* purchaser of the bond as to the bond and coupons not yet matured.¹¹ The bond may, by

¹ See *Douglas County v. Bolles*, 94 U. S. 104.

² *Broughton v. Pensacola*, 93 U. S. 266; *Milner v. Pensacola*, 2 Woods, 632.

³ *Mount Pleasant v. Beckwith*, 100 U. S. 514. See *State v. Lake City*, 25 Minn. 404.

⁴ *Ketchum v. St. Louis*, 101 U. S. 306.

⁵ *Mercer County v. Hackett*, 1 Wall. 83; *Murray v. Lardner*, 2 Wall. 110; *Cromwell v. Sac County*, 96 U. S. 51, 94 U. S. 351; *San Antonio v. Lane*, 32 Tex. 405; *Tucker v. New Hamp. Savings Bank*, 58 N. H. 83.

⁶ *Roberts v. Bolles*, 101 U. S. 119.

⁷ *Knox County v. Aspinwall*, 21 How. 539; *Thompson v. Lee County*, 3 Wall.

327; *Aurora v. West*, 7 Wall. 82, 105; *Kenosha v. Lamson*, 9 Wall. 477; *Cromwell v. Sac County*, 94 U. S. 351, 362; *Arents v. Commonwealth*, 18 Gratt. 750; *Nashville v. First Nat. Bank*, 1 Baxter (Tenn.), 402. But see *Clarke v. Janesville*, 1 Biss. 98.

⁸ *Clark v. Iowa City*, 20 Wall. 583 (distinguishing *Kenosha v. Lamson*, 9 Wall. 477, and *Lexington v. Butler*, 14 Wall. 282).

⁹ *Augusta Bank v. Augusta*, 49 Me. 507. But see *Porter v. Janesville* (U. S. C. C., W. D. Wis.), 3 Fed. Rep. 617.

¹⁰ *Cromwell v. Sac County*, 96 U. S. 51. But see *Diamond v. Lawrence County*, 37 Pa. St. 353.

¹¹ *Id.*

its terms, be made payable and sold beyond the limits of the State or county where it was issued.¹ The holder of coupons, in an action to recover upon them, is entitled to interest upon them as a part of his damages.²

Miscellaneous Points.— Various points relating to the proceedings under statutes authorizing municipal subscriptions have been passed upon, but it does not seem necessary to note them further than by reference to the cases.³

¹ *Meyer v. Muscatine*, 1 Wall. 384; *Lynde v. Winnebago County*, 16 Wall. 6; *Evansville, I., & C. S. L. R. Co. v. Evansville*, 15 Ind. 395. But see *People v. Tazewell County*, 22 Ill. 147; *Johnson v. Stark County*, 24 Ill. 75.

² *Gelpcke v. Dubuque*, 1 Wall. 175, 206; *Aurora v. West*, 7 Wall. 82, 105; *Cromwell v. Sac County*, 96 U. S. 51, 94 U. S. 351; *Hollingsworth v. Detroit*, 3 McLean, 472; *Beaver County v. Armstrong*, 44 Pa. St. 63; *North Penn. R. Co. v. Adams*, 54 Pa. St. 94; *San Antonio v. Lane*, 32 Tex. 405; *Welsh v. St. Paul & P. R. Co.*, 25 Minn. 314. But see *Rose v. Bridgeport*, 17 Conn. 243.

³ *State v. Ripley*, 9 Ind. 310; *Evansville, I., & C. S. L. R. Co. v. Evansville*, 15 Ind. 395; *Lafayette, M., & B. R. Co. v. Geiger*, 34 Ind. 185; *Garrigus v. Parke County*, 39 Ind. 66; *Crawford County v. Louisville, N. A., & S. L. A. L. R. Co.*, 39 Ind. 192; *State v. Wheadon*, 39 Ind. 520; *Cincinnati, W., & M. R. Co. v. Wells*, 39 Ind. 539; *Detroit, E. R., & I. R. Co. v. Bearss*, 39 Ind. 598; *Bronenberg v. Madison County*, 41 Ind. 502; *Noble v. Vincennes*, 42 Ind. 125; *Alvis v. Whitney*, 43 Ind. 83; *Williams v. Hall*, 65 Ind. 129; *Bittinger v. Bell*, 65 Ind. 445; *Columbus, C., & I. C. R. Co. v. Grant County*, 65 Ind. 427; *People v. Tazewell County*, 22 Ill. 147; *Pratt v. People*, 29 Ill. 54; *People v. Logan County*, 45 Ill. 162; *Madison County v. People*, 58 Ill. 456; *Marshall v. Silliman*, 61 Ill. 218; *McWhorter v. People*, 65 Ill. 290; *People v. Santa Anna*, 67 Ill. 57; *People v. Harp*, 67 Ill. 62; *People v. Laenna*, 67 Ill. 65; *Decker v. Hughes*, 68 Ill. 33; *Chestnutwood v. Hood*, 68 Ill. 132; *Chicago & I. R. Co. v. Pinckney*, 74 Ill. 277; *Alley*

v. Adams County, 76 Ill. 101; *Jackson County v. Brush*, 77 Ill. 59; *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 505; *Chicago, D., & V. R. Co. v. Coyer*, 79 Ill. 373; *Middleport v. Ætna Life Ins. Co.*, 82 Ill. 562; *Illinois Midland R. Co. v. Barnett*, 85 Ill. 313; *People v. Oldtown*, 88 Ill. 202; *Edwards v. People*, 88 Ill. 340; *McMillan v. Lee County*, 3 Iowa, 311; *Jordon v. Hayne*, 36 Iowa, 9; *Zorger v. Rapids*, 36 Iowa, 175; *B., C. R., & M. R. Co. v. Stewart*, 39 Iowa, 267; *Lamb v. B., C. R., & M. R. Co.*, 39 Iowa, 333; *Casady v. Lowry*, 49 Iowa, 523; *Phillips v. Albany*, 28 Wis. 340; *Lawson v. Mil. & N. R. Co.*, 30 Wis. 597; *Lawson v. Schnellen*, 33 Wis. 288; *St. Joseph & D. C. R. Co. v. Buchanan County*, 39 Mo. 485; *McPike v. Pen*, 51 Mo. 63; *Paola & F. R. R. Co. v. Anderson County*, 16 Kan. 302; *Redd v. Henry County*, 31 Gratt. 695; *Trammell v. Pennington*, 45 Ala. 673; *Austin v. Gulf, C., & S. F. R. Co.*, 45 Tex. 234; *Bowling Green & M. R. Co. v. Warren County*, 10 Bush, 711; *Danville v. Railroad Co.*, 43 Vt. 144; *Lamoille Valley R. Co. v. Fairfield*, 51 Vt. 257; *Douglass v. Chatham*, 41 Conn. 211; *Belfast & M. L. R. Co. v. Brooks*, 60 Me. 568; *Portland & O. R. Co. v. Standish*, 65 Me. 63; *Canton v. Smith*, 65 Me. 203; *Cass County v. Shores*, 95 U. S. 375; *Coleman v. Marin County*, 50 Cal. 493; *Stockton R. Co. v. Stockton*, 51 Cal. 328; *Mercer County v. Pittsburg & E. R. Co.*, 27 Pa. St. 389; *Crawford County v. Pittsburg & E. R. Co.*, 32 Pa. St. 141; *Lawrence County v. North Western R. Co.*, 32 Pa. St. 144; *Commonwealth v. Allegheny County*, 32 Pa. St. 218; *Commonwealth v. Allegheny County*, 37 Pa. St. 237; *Lawrence County's*

Appeal, 67 Pa. St. 87; *People v. Sawyer*, 52 N. Y. 296; *People v. Allen*, 52 N. Y. 538; *People v. Smith*, 55 N. Y. 135; *People v. Brown*, 55 N. Y. 180; *People v. Morgan*, 55 N. Y. 587, 1 *Thomp. & C.* 101; *People v. Suffern*, 68 N. Y. 321; *Gould v. Oneonta*, 71 N. Y. 298; *Springport v. Teutonia Savings Bank*, 75 N. Y. 397; *Wellsboro' v. New York & C. R. Co.*, 76 N. Y. 182; *Sweet v. Hulbert*, 51 Barb. 312; *People v. Hulbert*, 59 Barb. 446; *People v. Henshaw*, 61 Barb. 409; *People v. Peck*, 62 Barb. 545; *Newton v. Keech*, 9 Hun, 355; *Biddlecom v. Newton*, 13 Hun, 582; *Wilson v. Caneadea*, 15 Hun, 218; *Joslyn v. Dow*, 19 Hun, 494; *People v. Hatch*, 1 *Thomp. & C.* 113, 65 Barb. 430; *Venice v. Breed*, 1 *Thomp. & C.* 130, 65 Barb. 597; *People v. Wagner*, 1 *Thomp. & C.* 221; *People v. Oliver*, 1 *Thomp. & C.* 570; *People v. Hitchcock*, 2 *Thomp. & C.* 134; *People v. Deyoe*, 2 *Thomp. & C.* 142; *People v. Franklin*, 3 *Thomp. & C.* 794; *People v. Walter*, 4 *Thomp. & C.* 638, 2 Hun, 385.

CHAPTER V.

THE CAPITAL STOCK.

Incidents of Shares.—Shares in corporations, though not visible or tangible, are property, and have in general the incidents of property. They can be sold and attached on mesne process, and seized on execution. They are not choses in action, though in some respects analogous to them. They are usually treated as personal property, although the corporation itself is the owner of real estate. They entitle the holder to the right to participate, in a certain proportion, in the management, and to share in the net profits of the corporation, and, upon its dissolution, in the surplus of its capital remaining after the payment of its debts. They are not dowerable, or within the provisions of the Statute of Frauds respecting real estate, but are within those respecting personal estate.¹ The certificate is the evidence of the ownership of a certain interest in the property of the corporation.²

Liable to Attachment.—Shares in corporations are usually liable to attachment and execution, and to a garnishee or trustee process; but a creditor's remedy for subjecting them to the payment of debts varies under the legislation of the different States.³ By one method, the officer serving the process is required to leave a copy thereof with the recording officer of the corporation, and, after a sale on the execution, the recording officer is

¹ Greenl. Cruise, tit. 1, § 3; Bradley v. Holdsworth, 3 M. & W. 422; Tempest v. Kilner, 3 C. B. 249; Duncuft v. Albrecht, 12 Sim. 189; Sargent v. Franklin Ins. Co., 8 Pick. 90, 96; Tisdale v. Harris, 20 Pick. 9; Fisher v. Essex Bank, 5 Gray, 373; Pinkerton v. Manchester & L. R. Co., 42 N. H. 424, 451; Baltimore City Pass. R. Co. v. Sewell, 35 Md. 238; Weaver v. Barden, 49 N. Y. 286; Burrall v. Bushwick R. Co., 75 N. Y. 211; Chesapeake & O. R. Co. v. Paine, 29 Gratt. 502;

Mayer v. Child, 47 Cal. 142. In Kentucky the shares are held to be real estate. Price v. Price, 6 Dana, 107; Copeland v. Copeland, 7 Bush, 349. As to a *donatio causa mortis* of shares, see Moore v. Moore, L. R. 18 Eq. Cas. 474.

² Factors' & T. Ins. Co. v. Marine Dry Dock & S. Co., 31 La. An. 149.

³ Titcomb v. Union Marine & Fire Ins. Co., 8 Mass. 326; Baltimore & O. R. Co. v. Gallahue, 12 Gratt. 655; Chesapeake & O. R. Co. v. Paine, 29 Gratt. 502.

required to give to the purchaser a certificate of the shares levied upon and sold.¹ The purchaser at a sale on execution succeeds only to the debtor's rights as against the lien of the corporation.²

Not Negotiable. — The certificates of stock, although assignable, so as to pass an equitable title, are not negotiable instruments in the sense of the commercial law.³

Pledge of Shares. — A transfer of shares, absolute on its face, may be shown by parol evidence to have been made as collateral security for a debt, and a bill in equity may be maintained to redeem them.⁴ Shares held as a pledge can be sold only at public auction, and after demand of payment, with notice of time and place of sale.⁵

Sale of Shares; Delivery and Payment. — Where delivery of stock and payment therefor are by the contract to be concurrent acts, neither payment nor tender by the buyer, nor actual delivery by the seller, is necessary in order to give the party who is ready and offers to perform a right of action against the party who refuses. The vendor, when able to perform his agreement, may recover the price without first executing a transfer of the certificate to the vendee.⁶ Where a subscriber fails to pay the calls, or act in any way as a corporator, thus showing his purpose to abandon the contract, the corporation may, without selling the shares, cancel the subscription, and is not liable thereafter for refusing to deliver the certificate to him.⁷

A contract for the sale of shares, deliverable at a future day, where an actual transfer is intended, is valid at common law, although the vendor is not at the time the owner of shares, and has not entered into a contract to buy them.⁸ Such sales of stock,

¹ Gen. Stat. Mass. ch. 123, §§ 59–61, ch. 133, §§ 43–48; *Fisher v. Essex Bank*, 5 Gray, 373.

² *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513.

³ *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599, 623; *Weaver v. Barden*, 49 N. Y. 286; *Sewall v. Boston Water Power Co.*, 4 Allen, 277, 282; *Shaw v. Spencer*, 100 Mass. 382, 388; *Campbell v. Morgan*, 4 Brad. (Ill.) 100.

⁴ *Newton v. Fay*, 10 Allen, 505.

⁵ *Wilson v. Little*, 2 N. Y. 443; *Brown v. Ward*, 3 Duer, 660; *Indiana & I. C. R. Co. v. McKernan*, 24 Ind. 62.

⁶ *Munn v. Barnum*, 24 Barb. 283; *Currie v. White*, 45 N. Y. 822, 1 Sweeny, 166; *Hager v. Reed*, 11 Ohio St. 626; *Faulkner v. Hebard*, 26 Vt. 452.

⁷ *Perkins v. Union Button Hole & E. M. Co.*, 12 Allen, 273.

⁸ *Hibblewhite v. McMorine*, 5 M. & W. 462; *Noyes v. Spaulding*, 27 Vt. 420; *Currie v. White*, 45 N. Y. 822, 1 Sweeny, 166.

where the vendor is not an owner at the time, are sometimes prohibited by statute.¹ The purchaser on a sale *in presenti* is entitled to the dividends thereafter declared.² Subject to some exceptions, the vendor warrants his title to the shares.³

Fraud in Sales. — A vendor's fraud avoids a sale of stock, and the vendee can recover of him the price paid.⁴ Fraud in the sale of shares is actionable.⁵ The vendee may, in an action on the case against the vendor for his fraudulent representations, recover the difference between the value of the stock at the time of the sale and what the value would have been if the facts represented had been true.⁶

Transfers; Regulations and Restrictions. — The corporation may by by-laws regulate, but it cannot unreasonably restrict, transfers of shares.⁷ It cannot exercise a discretionary power in permitting them;⁸ or limit the owner as to the persons to whom he may make the transfer;⁹ or create a lien in its own favor on the shares;¹⁰ or make the approval of the board of directors essential to a valid transfer, where such approval would defeat the rights of third parties.¹¹

Mode and Effect of the Transfer. — The shares of the capital stock are assignable in the manner provided by statute or the by-laws.¹² These usually prescribe a mode of transfer which requires as the last step a record thereof on the company's books, and the issue of a new certificate; and they frequently add a provision, that the shares are transferable only in the mode prescribed. Different views have been taken as to the legal effect of an exclusive mode thus declared. A transfer on the books has sometimes been treated as "the originating act in the change

¹ *Ryder's Case*, 1 De Gex & J. 317; *Stebbins v. Leowolf*, 3 Cush. 137.

² *Currie v. White*, 45 N. Y. 822, 1 Sweeny, 166; *Johnson v. Underhill*, 52 N. Y. 203.

³ *Ketchum v. Stevens*, 19 N. Y. 499.

⁴ *Bradley v. Poole*, 98 Mass. 169. See *ante*, Chap. II. pp. 41, 42, Chap. IV. pp. 61, 62. As to fraud of the company in its sale of stock, see *McClellan v. Scott*, 24 Wis. 81.

⁵ *McAleer v. Horsey*, 35 Md. 439.

⁶ *Bowman v. Parker*, 40 Vt. 410.

⁷ *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Moore v. Bank of Commerce*, 52 Mo. 377.

⁸ *Weston's Case*, L. R. 4 Ch. App. 20, L. R. 6 Eq. Cas. 238. See *Robinson v. Chartered Bank*, L. R. 1 Eq. Cas. 32.

⁹ *Chouteau Spring Co. v. Harris*, 20 Mo. 382.

¹⁰ See *post*, p. 129.

¹¹ *Farmers' & M. Bank v. Wasson*, 48 Iowa, 336.

¹² *Angell & A. on Corp. ch. xvi.*

of title," so that an unrecorded assignment conveyed no title to the vendee.¹ But the prevailing view gives full effect to the assignment as between the parties, and makes it inoperative, — for the reason that it is not entered on the company's books, as required by the charter or by-laws, — only when the rights of the corporation or of innocent third parties are concerned. According to the usual practice in selling shares, the stockholder signs a form of transfer on the certificate, which includes a power of attorney to transfer the shares, leaving a blank for the name of the attorney, which, although under seal, may be filled by the purchaser. A transfer in this form, though not entered on the company's books as required, passes the title to the vendee, subject to the equities of the corporation, and of innocent purchasers who, without knowledge of the transfer, obtain title by an assignment, as provided by the charter or by-laws.²

A transfer on the books completes the title of the vendee as between him and the corporation, without the issue of a certificate, which is only additional evidence of title.³ The assignee

¹ *Oxford Turnp. Co. v. Bunnel*, 6 Conn. 552; *Marlborough Man. Co. v. Smith*, 2 Conn. 579; *Northrop v. Newton & B. Turnp. Co.*, 3 Conn. 544. These cases have been approved in a few instances. *Pittsburg & C. R. Co. v. Clarke*, 29 Pa. St. 146, 151, 152; *Fisher v. Essex Bank*, 5 Gray, 373, 383. More recently, an assignment which does not comply with the mode prescribed by the charter or by-laws has been held in Connecticut to convey an equitable title. *Colt v. Ives*, 31 Conn. 25; *Isham v. Buckingham*, 49 N. Y. 216; *Stone v. Hackett*, 12 Gray, 227, 231.

² *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Stone v. Hackett*, 12 Gray, 227; *Union Bank v. Laird*, 2 Wheat. 390; *Bank of Utica v. Smalley*, 2 Cowen, 770; *Kortright v. Commercial Bank*, 20 Wend. 91, 22 Wend. 348; *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599, 624; *Orr v. Bigelow*, 14 N. Y. 556; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 80; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 331; *Isham v. Buckingham*, 49 N. Y. 216; *Johnson v. Underhill*, 52 N. Y. 203; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *De Comeau v. Guild Farm*

Oil Co., 3 Daly, 218; *Driscoll v. West B. & C. Man. Co.*, 36 N. Y. Superior, 488, 59 N. Y. 96; *Hill v. Newichawanick Co.*, 48 How. Pr. 427; *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231; *Mount Holly, L. & M. Turnp. v. Ferre*, 2 C. E. Green, 117; *Noyes v. Spaulding*, 27 Vt. 420; *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238; *Black v. Zacharie*, 3 How. 483, 513; *Dewing v. Perdicaries*, 96 U. S. 193, 196; *Conant v. Seneca County Bank*, 1 Ohio St. 298, 306; *Haldeman v. Hillsborough & C. R. Co.*, 2 Handy (Cincinnati), 101; *Campbell v. Morgan*, 4 Brad. (Ill.), 100; *Kellogg v. Stockwell*, 75 Ill. 68; *Boatman's Ins. & T. Co. v. Able*, 48 Mo. 136; *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; *Weston v. Bear River & A. W. & M. Co.*, 5 Cal. 186, 6 Cal. 425; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529; *People v. Elmore*, 35 Cal. 653; *Parrott v. Byers*, 40 Cal. 614; *Winter v. Belmont Mining Co.*, 53 Cal. 428; *Strange v. Houston & T. R. Co.* (Tex. S. C.), 10 Reporter, 28, 22 A. L. J. 153.

³ *Agricultural Bank v. Burr*, 24 Me. 256; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *First National Bank v. Gifford*, 47 Iowa, 575.

has not, until he has acquired the legal title, a right of action in his own name against the corporation.¹

The vendor, until the transfer is made on the books of the company, as required by statute, remains liable for calls and for the debts of the corporation, under statutes imposing a personal liability on stockholders ;² but he may recover of the vendee the calls made since the assignment which he has been required to pay, and by bill in equity compel the vendee to record the transfer.³ The vendee may also recover of the vendor the dividends declared by the company after the sale and received by the vendor.⁴

The corporation may waive conditions of transfer established by its by-laws, and be estopped by its omissions from setting up such conditions in its own favor even when prescribed by statute. Thus, it cannot insist in a suit for calls that there was no record of the defendant's transfer upon its books, as required by its rules and a statute, where it neglected after request to make the record, and treated the transferee as the owner.⁵

Adverse Claims of Attaching Creditors and Purchasers.—The rights of attaching creditors and of purchasers, whose title has not been registered on the company's books, as required by law, have been adjusted differently in different jurisdictions. Where the statute provides that the shares shall be transferable only on the company's books, an assignment without a compliance with this requirement has been held not to avail against an attachment of the shares by a creditor of the vendor.⁶ Even where the statute does not prescribe such a record as an exclusive mode, but

¹ *Brown v. Adams*, 5 Biss. 181.

² *Pittsburg & C. R. Co. v. Clarke*, 29 Pa. St. 146 ; *Shellington v. Howland*, 53 N. Y. 371.

³ *Johnson v. Underhill*, 52 N. Y. 203 ; *Webster v. Upton*, 91 U. S. 65 ; *Kellogg v. Stockwell*, 75 Ill. 68 ; *Wynne v. Price*, 3 De Gex & S. 310.

⁴ *Currie v. White*, 45 N. Y. 822, 1 Sweny, 166.

⁵ *Isham v. Buckingham*, 49 N. Y. 216.

⁶ *Fisher v. Essex Bank*, 5 Gray, 373 ; *Blanchard v. Dedham Gas Light Co.*, 12 Gray, 213 ; *People's Bank v. Gridley* (Ill. S. C., June, 1879), 8 Reporter, 76. *Contra*, *Broadway Bank v. McElrath*, 2 Beasley,

24, where, however, the word "only" was omitted from the provision. It is implied in the reasoning of the Massachusetts cases cited above that the transfer is of no effect even as between the vendor and vendee, until recorded at the office or delivered there for record. But see *Stone v. Hackett*, 12 Gray, 227, 231. The doctrine stated in the text is qualified in California, where it is held that it does not apply if the purchaser at a sale on execution has notice of the previous assignment. *Weston v. Bear River & A. W. & M. Co.*, 6 Cal. 425, 5 Cal. 186 ; *Strout v. Natoma Water & M. Co.*, 9 Cal. 78 ; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529 ; *Parrott v. Byers*, 40 Cal. 614.

simply requires it to be made, the failure to make it, leaving the vendor, according to the record, in the apparent possession of the stock, is held *prima facie*, and, if unexplained, conclusive evidence of a secret trust so as to make the imperfect transfer void as against attaching creditors. It was considered that, applying the rules which govern the sale and delivery of other personal property, the transfer is invalid, where the vendee fails to obtain the *indicia* of ownership and muniments of title appropriate to this kind of property, and there is therefore an omission to complete the transaction in the authentic manner designated by law;¹ but if due diligence was used to perfect the transfer, it will take effect against an attachment intervening between the execution of the assignment and the act of recording on the company's books.² In other jurisdictions, where the statute provision requiring an entry of the transfer on the company's books is regarded as only intended for the company's protection, and one which it may waive, an attaching creditor obtains only the right belonging to the debtor at the time of the service of process, and his attachment will not prevail against a prior unrecorded sale or lien.³

The effect of an assignment of the share on the liability of the subscriber for calls,⁴ and on the right to vote upon shares,⁵ has been already treated.

Liability of the Corporation for Wrongful Transfers. — A stockholder, unless chargeable with negligence, is not bound by alterations obvious on the face of his assignment, by which a larger number of shares is conveyed than the number written by himself, and may recover of the corporation, which is put on inquiry by the appearance of the paper itself, damages for transferring the excess.⁶

A stockholder cannot, without negligence on his part, be deprived of his shares by a forged transfer. If the company, misled by a forgery, cancels his certificate and issues a new one to an

¹ Pinkerton v. Manchester & L. R. Co., 42 N. H. 424.

² Pinkerton v. Manchester & L. R. Co., 42 N. H. 424; Colt v. Ives, 31 Conn. 25.

³ Haldeman v. Hillsborough & C. R. Co., 2 Handy (Cincinnati), 101; De Co-meau v. Guild Farm Oil Co., 3 Daly, 218; Fraser v. Charleston, 11 S. C. 486,

519; Merchants' Nat. Bank v. Richards, 6 Mo. App. 454; Cornick v. Richards, 3 Lea (Tenn.), 1. See also United States v. Vaughan, 3 Binney, 394.

⁴ Ante, p. 80.

⁵ Ante, pp. 24, 25.

⁶ Sewall v. Boston Water Power Co., 4 Allen, 277.

innocent person who derives title under the forged transfer, he is entitled to have his name restored to its books, and to the issue of a new certificate to him, and to be paid the dividends which would have been payable to him if his title had not been interfered with.¹ But he may forfeit his right by culpable conduct or negligence.² As between the corporation which is not chargeable with negligence and an innocent person claiming under the forged transfer, the loss will fall on the latter.³

A corporation, as the trustee of its stockholders and the custodian of the record of the ownership and transfer of stock, is bound to use due care to prevent unauthorized transfers. It is its duty, whenever there are circumstances within its knowledge calculated to excite suspicion, to inquire as to the title of the person presenting a paper which purports to be a transfer, and requesting to be recorded as the owner.⁴ It will incur liability to an innocent transferee if it fails to require the surrender of the certificate or proof of its loss, where such precautions are required by its by-laws or by statute, or the terms of the certificate.⁵

A corporation, by issuing a certificate which it is by law authorized to issue, it has been held, makes thereby a continuing affirmation of the ownership of the share by the person designated in it as stockholder until it is withdrawn in some manner recognized by law, and it is estopped from denying his title in a suit brought against it by parties claiming through him.⁶

The purchaser of shares is not bound to look beyond the cer-

¹ *Western Union Tel. Co. v. Davenport*, 97 U. S. 369; *Pratt v. Taunton Copper Co.*, 123 Mass. 110; *Brown v. Howard Fire Ins. Co.*, 42 Md. 384; *Hambleton v. Central Ohio R. Co.*, 44 Md. 551; *Pollock v. National Bank*, 7 N. Y. 274.

² *Coles v. Bank of England*, 10 Ad. & E. 437; *Penn. R. Co.'s Appeal*, 86 Pa. St. 80; *Friedlander v. Slaughter House Co.*, 31 La. An. 523.

³ *Brown v. Howard Fire Ins. Co.*, 42 Md. 384; *Hambleton v. Central Ohio R. Co.*, 44 Md. 551; *Simm v. Anglo-Am. Tel. Co.*, L. R. 5 Q. B. Div. 188 (commenting on *Bahia & S. F. R. Co.*, *In re*, L. R. 3 Q. B. 584, and *Hart v. Frontino & B. S. A. G. M. Co.*, L. R. 5 Exch. 111). But see *Machinists' Nat. Bank v. Field*, 126 Mass. 345.

⁴ *Bayard v. Farmers' & M. Bank*, 52 Pa. St. 232; *Penn. R. Co.'s Appeal*, 86

Pa. St. 80; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Loring v. Salisbury Mills*, 125 Mass. 138; *Western Union Tel. Co. v. Davenport*, 97 U. S. 369; *Campbell v. Morgan*, 4 Brad. (Ill.) 100; *Cleveland & M. R. Co. v. Tapett (Ohio S. C.)*, 22 A. L. J. 117.

⁵ *Factors' & T. Ins. Co. v. Marine Dry Dock & S. Co.*, 31 La. An. 149; *Bank v. Lanier*, 11 Wall. 369; *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231, 270.

⁶ *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Strange v. Houston & T. C. R. Co. (S. C. Tex.)*, 10 Reporter, 28, 22 A. L. J. 153. But see *Simm v. Anglo-Am. Tel. Co.*, L. R. 5 Q. B. Div. 188; *Central R. & B. Co. v. Ward*, 37 Ga. 515, 531; *South Western R. Co. v. Thomason*, 40 Ga. 408; *Nutting v. Thomasson*, 57 Ga. 418, 46 Ga. 84.

tificates issued by the corporation, and examine its books in search of the validity of earlier assignments.¹ The company having registered a person as a stockholder cannot displace him, except in favor of one who has a better title.²

The acts of the corporation under a statute and order of the Confederate States in erasing the names of certain stockholders from its books, and inserting those of purchasers under a sale made in pursuance of such statute and order, being void, the corporation is not liable to the purchasers or their assignees for their failure to obtain a title.³

Transfers by Executors, Administrators, Trustees, and Assignees in Bankruptcy. — Shares standing in the name of a stockholder may be transferred by his administrator, executor, or assignee in bankruptcy, or by a trustee having the legal title; but where the person assuming to make the transfer is an executor or trustee, the corporation, it has been held, must take notice of the limitations of his trust, and is liable when a transfer is made in violation thereof.⁴ So, also, it is liable when it is privy to assignments known by it to be made by persons acting in a fiduciary character in violation of their duty.⁵ An administrator duly qualified as such succeeds by operation of law to the legal title of the decedent stockholder, and may vote at the election of directors.⁶ A foreign executor or administrator has the same powers, and does not require a domestic reappointment.⁷

Sales by Agents and Trustees in Breach of Trust. — Where the stockholder executes an assignment and power, in the usual form, to his agent or trustee, and thus clothes him with the apparent title, such agent or trustee may, contrary to instruc-

¹ Lowry v. Commercial & F. Bank, Taney, 310; Bayard v. Farmers' & M. Bank, 52 Pa. St. 232; Salisbury Mills v. Townsend, 109 Mass. 115; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616. As to the effect of *lis pendens*, see this last case.

² Ward v. South Eastern R. Co., 2 El. & El. 812.

³ Central R. & B. Co. v. Ward, 37 Ga. 515. See Keppel v. Petersburg R. Co., Chase's Dec. 167.

⁴ Bayard v. Farmers' & M. Bank, 52 Pa. St. 232; Lowry v. Commercial & F. Bank, Taney, 310; Atkinson v. Atkinson,

8 Allen, 15. See Nutting v. Thomasson, 57 Ga. 418. Where shares stand on the books in the name of a person with the affix of "cashier," his resignation as cashier and the election of a successor do not alone work a transfer of the trust. Mohawk & H. R. Co., *In re*, 19 Wend. 135.

⁵ Lowry v. Commercial & F. Bank, Taney, 310.

⁶ North Shore Staten Island Ferry Co., *In re*, 63 Barb. 556.

⁷ Middlebrook v. Merchants' Bank, 3 Keyes, 135; Hutchins v. State Bank, 12 Met. 421.

tions and in breach of trust, in order to obtain a loan to himself, convey a good title to an innocent purchaser, who will be entitled to a certificate from the corporation. By executing and delivering the instrument he held out the agent or trustee to be the true owner, and he is estopped from asserting his own title against those who have been misled by his act.¹ But if the purchaser received actual notice of the fiduciary character of the apparent owner, or the certificate itself, by indicating it, put him on inquiry, an assignment, known to him to be made for the purpose of securing a private debt of the agent or trustee, will not be valid against the real owner.² Where an administrator, who is allowed by law to sell only at public auction, sells shares at private sale, the sale is voidable, as the vendee must have known the capacity in which, and the law under which, the administrator acted; the vendee, however, may convey a good title to other purchasers who are ignorant of the defect.³

Remedies at Law. — An action, either case or assumpsit, lies against a corporation for a wrongful refusal to issue a certificate, or permit a transfer of shares, to the party entitled thereto;⁴ or for cancelling a certificate and allowing a transfer in violation of a stockholder's rights.⁵ A suit against the corporation for refusing

¹ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 55 Barb. 59; *Weaver v. Barden*, 49 N. Y. 286; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Loring v. Salisbury Mills*, 125 Mass. 138; *Stinson v. Thornton*, 56 Ga. 377; *Bayard v. Farmers' & M. Bank*, 52 Pa. St. 232; *Strange v. Houston & T. C. R. Co.* (Tex. S. C.), 10 Reporter, 28; *Wood's Appeal* (Penn. S. C.), 10 Reporter, 125. The case of *McNeil v. Tenth Nat. Bank* is distinguished in *Merchants' Bank v. Livingston*, 74 N. Y. 223. Where the assignment was made in blank, to be used for a particular purpose, and the person receiving it, after filling the blank with one name, erased it and inserted another, his authority to fill the blank was held to be exhausted by the first insertion. *Denny v. Lyon*, 38 Pa. St. 98.

² *Shaw v. Spencer*, 100 Mass. 382; *Fisher v. Brown*, 104 Mass. 259; *Loring v. Salisbury Mills*, 125 Mass. 138; *Merchants' Bank v. Livingston*, 74 N. Y. 223; *Budd v. Munroe*, 18 Hun, 316. See

Sprague v. Cocheco Man. Co., 10 Blatch. 173; *Lowry v. Commercial & F. Bank*, Taney, 310; *Shropshire Union R. & C. Co. v. Queen*, L. R. 7 H. L. 496, L. R. 8 Q. B. 420.

³ *Nutting v. Thomasson*, 46 Ga. 34.

⁴ *Commercial Bank v. Kortright*, 20 Wend. 91, 22 Wend. 348; *Mechanics' Bank v. New York & N. H. Co.*, 13 N. Y. 599, 624; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Busey v. Hooper*, 35 Md. 15; *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238; *Hussey v. Manufacturers' & M. Bank*, 10 Pick. 415; *Wyman v. American Powder Co.*, 8 Cush. 168; *Murray v. Stevens*, 110 Mass. 95; *Stackpole v. Seymour*, 127 Mass. 104; *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231; *Helm v. Swiggett*, 12 Ind. 194; *Protection Life Ins. Co. v. Osgood*, 93 Ill. 69; *Bank of America v. McNeil*, 10 Bush, 54; *Catchpole v. Ambergate, N., & B., & E. J. R. Co.*, 1 El. & B. 111.

⁵ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 332; *Factors' & T. Ins. Co. v.*

to transfer stock should be preceded by a demand made at a time and place when it cannot rightfully refuse to comply.¹ Trover will lie against a pledgee selling without notice.²

Mandamus. — The writ of mandamus has been issued to compel a corporation to perform its duty in issuing certificates and transferring shares.³ It was, however, denied by Lord Mansfield in such a case,⁴ and, there being a complete remedy by action, the writ ought not, according to the better authorities, to be granted.⁵

Remedy in Equity. — Equity will enforce specific performance of an agreement to transfer shares in a corporation,⁶ and will at the suit of a vendor compel the vendee to record a transfer, so as to substitute him as a stockholder in place of the vendor.⁷ It will compel the corporation to issue or transfer shares to a party entitled to the issue or transfer.⁸ It will compel such a transfer to a bankrupt's assignee, who has succeeded to his rights.⁹ The corporation may maintain a bill of interpleader against opposing claimants of dividends.¹⁰

Measure of Damages. — In suits between a vendor and a vendee of shares for breach of contract to purchase or deliver them, the

Marine Dry Dock & S. Co., 31 La. An. 149; *Salisbury Mills v. Townsend*, 109 Mass. 115; *Loring v. Salisbury Mills*, 125 Mass. 138.

¹ *Neiler v. Kelley*, 69 Pa. St. 403.

² *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

³ *Townsend v. McIver*, 2 S. C. 25; *People v. Crockett*, 9 Cal. 112; *King v. Worcester & B. Canal Nav. Co.*, 1 Man. & R. 529; *Regina v. Liverpool, M., & N. R. Co.*, 16 Jur. 949, 11 Eng. L. & Eq. 408; *Queen v. Shropshire Union R. & C. Co.*, L. R. 8 Q. B. 420; *Moses on Mandamus*, p. 108. See *Helm v. Swiggett*, 12 Ind. 194.

⁴ *King v. Bank of England*, Douglass, 524; *State v. Warren Foundry & M. Co.*, 3 Vroom, 439; *Shipley v. Mechanics' Bank*, 10 Johns. 484; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 85; *Wilkinson v. Providence Bank*, 3 R. I. 22. See *Busey v. Hooper*, 35 Md. 15, 26.

⁵ *Murray v. Stevens*, 110 Mass. 95;

Stackpole v. Seymour, 127 Mass. 104; *Fireman's Ins. Co., In re*, 6 Hill, 243; *State v. Rombauer*, 46 Mo. 155; *Birmingham Fire Ins. Co. v. Commonwealth (Penn. S. C.)*, 9 Reporter, 186; *Shropshire Union R. & C. Co. v. Queen*, L. R. 7 H. L. 496, L. R. 8 Q. B. 420.

⁶ *Leach v. Fobes*, 11 Gray, 506; *Todd v. Taft*, 7 Allen, 371; *Anthony v. Atkinson*, 2 Sweeny (N. Y.), 228; *Duncuft v. Albrecht*, 12 Sim. 189; *Cheale v. Kenward*, 3 De Gex & J. 27.

⁷ *Webster v. Upton*, 91 U. S. 65; *Wynne v. Price*, 3 De Gex & S. 310.

⁸ *Chew v. Bank of Baltimore*, 14 Md. 299; *Pollock v. National Bank*, 7 N. Y. 274; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336, 347; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211.

⁹ *Wilson v. Atlantic & St. L. R. Co. (U. S. D. C., D. Me., Feb. 1880)*, 2 Fed. Rep. 459.

¹⁰ *Salisbury Mills v. Townsend*, 109 Mass. 115. See *Dalton v. Midland R. Co.*, 12 C. B. 458, 13 C. B. 474.

measure of damages is the difference between the contract price and the market value at the time of the breach.¹ A party, subscribing for shares at the request of another, who agrees to take them and indemnify him, may recover of the person so agreeing the amount advanced, with interest, on the latter's refusal to fulfil the agreement, and is not limited to the amount paid, less the market value at the time of the refusal.² In an action on a guaranty that the shares sold shall yield certain annual dividends for a certain period, the measure of damages is the difference between the actual value of the shares and their value if they had proved to be of the stipulated quality.³ In an action brought by a person entitled to a certificate of shares against a corporation wrongfully refusing to issue it to him, the measure of damages is the value of the stock at the time of the demand, with interest and with dividends, if any, added.⁴ The rule is the same where, the consideration having been paid, the action is brought against parties, other than the corporation, for a conversion of the stock or for breach of contract to deliver shares.⁵

Dividends.—Dividends are corporate funds derived from the earnings of the corporation, and appropriated by a corporate act to be divided among the stockholders. A holder of shares has no legal title to any part of the profits on hand until a division is made.⁶ But when a dividend is declared, the share of each stockholder in the net income is thus severed from the common fund, and he can recover it in an action of assumpsit.⁷ He may also, where

¹ *Rand v. White Mountains R.*, 40 N. H. 79; *Currie v. White*, 45 N. Y. 822, 1 Sweeny, 166; *Shaw v. Holland*, 15 M. & W. 136; *Pott v. Flather*, 5 Eng. Rail. & Can. Cas. 85; *Tempest v. Kilner*, 3 C. B. 249, 253.

² *Orr v. Bigelow*, 14 N. Y. 556.

³ *Struthers v. Clark*, 30 Pa. St. 210.

⁴ *Hussey v. Manufacturers' & M. Bank*, 10 Pick. 415; *Wyman v. American Powder Co.*, 8 Cush. 168; *Sewall v. Boston Water Power Co.*, 4 Allen, 277; *Baltimore City Pass. R. Co. v. Sewall*, 35 Md. 238; *Pinkerton v. Manchester & L. R. Co.*, 42 N. H. 424. See *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269, 304. Some authorities have admitted as a rule of damages for the conversion of property, subject like stock to much fluctuation, the

highest market price between the time of the conversion and the time of the commencement of the action or of the trial; but they are not in harmony with the prevailing view. *Commercial Bank v. Kortright*, 22 Wend. 348; *Wilson v. Matthews*, 24 Barb. 295; *Romaine v. Van Allen*, 26 N. Y. 309; *Van Allen v. Illinois Cent. R. Co.*, 7 Bosw. 515; *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Neiler v. Kelley*, 69 Pa. St. 403.

⁵ *Orange & A. R. Co. v. Fulvey*, 17 Gratt. 366.

⁶ *Hyatt v. Allen*, 56 N. Y. 553. See *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393; *Chicago, B., & Q. R. Co. v. Page*, 1 Biss. 461.

⁷ *Kane v. Bloodgood*, 7 Johns. Ch. 90;

the other stockholders have received a dividend, without an amount being set apart for him, recover of the corporation his proportionate share;¹ but he cannot recover of another stockholder who may have received more than he would be entitled to on an equal division.² Equity, it has been held, will compel the payment of a dividend which has been declared.³ The dividend can be made only from profits, and not from the capital stock.⁴

The dividends must be general and equal on all the stock, without discrimination in favor of particular stockholders;⁵ and equity will interfere to control directors who undertake to discriminate between stockholders.⁶ Dividends belong, irrespective of the time when earned, to the person who is the owner of the stock when they are declared, and not to any prior owner;⁷ and the rule is the same, although the order declaring them makes them payable at a later date, between which and the time of declaring them the shares have been sold.⁸ In the case of a sale *in presenti*, the vendor becomes a *quasi* trustee for the purchaser, who is entitled to all dividends accruing thereafter.⁹ A person who has become a stockholder by the conversion of the company's bonds into stock has the same rights as other stockholders.¹⁰ A stockholder who has received new stock for his

Le Roy v. Globe Ins. Co., 2 Edw. Ch. 657; *Scott v. Central R. & B. Co.*, 52 Barb. 45; *Chase v. Vanderbilt*, 37 N. Y. Superior, 334; *Ehle v. Chittenango Bank*, 24 N. Y. 548; *Keppel v. Petersburg R. Co.*, Chase's Dec. 167; *King v. Paterson & H. R. R. Co.*, 5 Dutcher, 82, 504; *State v. Baltimore & O. R. Co.*, 6 Gill, 363; *Philadelphia, W., & B. R. Co. v. Cowell*, 28 Pa. St. 329; *Westchester & P. R. Co. v. Jackson*, 77 Pa. St. 321. In a suit for a dividend the question of profits cannot be inquired into. *Scott v. Central R. Co.*, 52 Barb. 45.

¹ *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542; *Jackson v. Newark Plank Road Co.*, 2 Vroom, 277.

² *Peckham v. Van Wagenen*, 45 N. Y. Superior, 328.

³ *Beers v. Bridgeport Spring Bank*, 24 Conn. 17. Mandamus is not a proper remedy to compel the payment of a dividend which has been declared. *People v. Central Car. & M. Co.*, 41 Mich. 166.

⁴ *Burnes v. Pennell*, 2 H. L. Cas. 497, 531.

⁵ *Ryder v. Alton & S. R. Co.*, 13 Ill. 516; *Jones v. Terre Haute & R. R. Co.*, 57 N. Y. 196, 29 Barb. 353.

⁶ *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. 510.

⁷ *Brundage v. Brundage*, 65 Barb. 397, 1 Thomp. & C. 82; *Jones v. Terre Haute & R. R. Co.*, 57 N. Y. 196, 29 Barb. 353; *Hill v. Newichawanick Co.*, 48 How. Pr. 427; *Goodwin v. Hardy*, 57 Me. 143; *Central R. & B. Co. v. Papot*, 59 Ga. 342; *March v. Eastern R. Co.*, 43 N. H. 515; *Ryan v. Leavenworth, A., & N. W. R. Co.*, 21 Kan. 365, 402; *Black v. Homersham, L. R.* 4 Exch. Div. 24.

⁸ *Spear v. Hart*, 3 Rob. 420; *Bright v. Lord*, 51 Ind. 272. *Contra*, *Burroughs v. North Carolina R. Co.*, 67 N. C. 376.

⁹ *Currie v. White*, 45 N. Y. 822, 1 Sweeney, 166.

¹⁰ *Jones v. Terre Haute & R. R. Co.*, 57 N. Y. 196.

dividends is not entitled to a dividend in money.¹ A bondholder who has been paid his interest and is entitled to stock for his bonds, is entitled to stock only to the amount of the principal of his bonds.² The Statute of Limitations does not begin to run on dividends until demand and refusal.³

The making of dividends is a customary power of the directors; and whether the net-profits of a corporation shall be used for improvements or other lawful purposes in its business, or be divided among the stockholders, is peculiarly a matter within their discretion. This discretion has, however, been held subject to judicial control. Equity has intervened at the suit of stockholders to compel them to declare a dividend where there appeared to have been a wilful abuse of discretion, or bad faith, or a perverse refusal to declare one.⁴ But as the making of a dividend concerns the internal management of the corporation, this remedy will be applied only in the State which created it.⁵ Equity will enjoin the making of a dividend when there are no funds applicable to the purpose, or where it is prohibited by statute;⁶ and it will intervene to restrain the directors from paying a dividend to the holders of spurious stock;⁷ or from making a partial and unequal dividend.⁸ Dividends are presumed to be payable in lawful money.⁹ A demand should precede an action for a dividend.¹⁰

¹ *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393.

² *Sutliff v. Cleveland & M. R. Co.*, 24 Ohio St. 147.

³ *Philadelphia, W., & B. R. Co. v. Cowell*, 28 Pa. St. 329.

⁴ *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Pratt v. Pratt*, 33 Conn. 446; *Smith v. Prattville Man. Co.*, 29 Ala. 503; *Scott v. Eagle Fire Ins. Co.*, 7 Paige, 198; *Ely v. Sprague, Clarke* (N. Y.), 351; *Thompson v. Erie R. Co.*, 45 N. Y. 468; *Karnes v. Rochester & G. V. R. Co.*, 4 Abbott Pr. n. s. 107; *State v. Bank of La.*, 6 La. 745; *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393; *Stevens v. South Devon R. Co.*, 9 Hare, 313; *Browne v. Monmouthshire R. Co.*, 13 Beav. 32.

⁵ *Williston v. Mich. S. & N. I. R. Co.*, 13 Allen, 400; *Howell v. Chicago & N. W. R. Co.*, 51 Barb. 378; *Chase v. Vanderbilt*, 37 N. Y. Superior, 334, 62 N. Y.

307. *Contra, Prouty v. Mich. S. & N. I. R. Co.*, 52 N. Y. 363, 4 Thomp. & C. 230, 1 Hun, 655.

⁶ *Carpenter v. New York & N. H. R. Co.*, 5 Abbott Pr. 277; *Browne v. Monmouthshire R. Co.*, 13 Beav. 32; *Carlisle v. South Eastern R. Co.*, 1 Mac. & G. 689; *Fawcett v. Laurie*, 1 Drewry & S. 192; *Allen v. Abbot*, 30 Law Times, 316; *Burnes v. Pennell*, 2 H. L. Cas. 497, 531.

⁷ *Underwood v. New York & N. H. R. Co.*, 17 How. Pr. 537.

⁸ *Luling v. Atlantic Mut. Ins. Co.*, 45 Barb. 510.

⁹ *Ehle v. Chittenango Bank*, 24 N. Y. 548. As to dividends payable in Confederate currency, see *Scott v. Central R. & B. Co.*, 52 Barb. 45; *Keppel v. Petersburg R. Co.*, Chase's Dec. 167.

¹⁰ *Scott v. Central R. & B. Co.*, 52 Barb. 45; *Hagar v. Union Nat. Bank*, 63 Me. 509.

Stock Dividends. — Dividends of stock have been issued where there were net earnings, properly applicable for the purposes of a dividend in cash, and it was deemed expedient to retain the amount in order to make permanent improvements or pay debts. They can only be made where there is a power to increase the capital stock to the extent of such dividends.¹ New stock has been issued with the privilege given to present stockholders to take it by paying the par value or a less sum.² Bonds convertible into stock have also been issued.³

Where there are distinct interests in stock, created under a will or trust, the owner of one being entitled to the income for life, and the owner of the other to the remainder or principal, the right to share in the surplus earnings, in the form of extra or stock dividends, may come in question. Some courts undertake an inquiry as to the time when the surplus fund was earned, treating it as capital, if accruing before the testator's death, and income, if accruing afterwards;⁴ but others decline to inquire into the accounts and affairs of the corporation, and adopt a more definite rule, treating cash dividends, however large, as income, and stock dividends as capital, and determining whether a dividend is an apportionment of stock, or a division of profits by the substance and intent of the action of the corporation, as shown by its votes.⁵

Rights of Stockholders upon an Increase of Capital Stock. — It was held at an early period that the stockholders of a corporation have each a prior right, to the exclusion of the public, to a pro-

¹ *Howell v. Chicago & N. W. R. Co.*, 51 Barb. 378; *Miller v. Ill. Cent. R. Co.*, 24 Barb. 312; *State v. Balt. & O. R. Co.*, 6 Gill, 363; *Boston & L. R. Co. v. Commonwealth*, 100 Mass. 399. Holders of scrip convertible into shares of stock, and entitling the holders to cash dividends, are, after the conversion and the payment of the funded debt, entitled only to dividends accruing after such conversion and payment. *Brown v. Lehigh Coal & N. Co.*, 49 Pa. St. 270. Dividends of stock have been issued to pay interest on stock. *Ohio City v. Cleveland & T. R. Co.*, 6 Ohio St. 489.

² *Wiltbank's Appeal*, 64 Pa. St. 256; *Moss's Appeal*, 83 Pa. St. 265.

³ *Denney v. Cleveland & P. R. Co.*, 28 Ohio St. 108; *Jones v. Terre Haute & R. Co.*, 57 N. Y. 196, 29 Barb. 353.

⁴ *Earp's Appeal*, 28 Pa. St. 368; *Wiltbank's Appeal*, 64 Pa. St. 256; *Van Doren v. Olden*, 4 C. E. Green, 176; *Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 Barb. 637; *Lord v. Brooks*, 52 N. H. 72. New shares, subscribed for at par by stockholders, are capital. *Moss's Appeal*, 83 Pa. St. 264.

⁵ *Minot v. Paine*, 99 Mass. 101; *Daland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Mass. 542; *Rand v. Hubbell*, 115 Mass. 461; *Gifford v. Thompson*, 115 Mass. 478. See *Parker v. Mason*, 8 R. I. 427.

portionate share of any increase of the capital stock;¹ but this doctrine, which was based on an analogy derived from the relation of partners, cannot well be applied to a corporation which exists independently of the stockholders, with its economy and modes of action defined by statute.² The right, where it is held to exist, may be waived;³ and it is to be applied only to original issues, and not to reissues of stock of which the corporation has become the owner by purchase.⁴

Preferred Stock. — The issue of preferred stock is a mode by which a corporation obtains funds for its enterprise, without borrowing money and contracting a debt. Its holders are a privileged class, who are entitled to dividends of a certain per cent, payable out of net earnings in priority to any dividends upon the ordinary stock.⁵ The power of a corporation to distinguish between its stockholders, and to form them into classes, even in the original creation of its capital stock, may well be doubted, as such a discrimination would often be contrary to the policy and scheme of legislation concerning the duties and liabilities of corporations and their members; but the reason is much stronger against the inference of a power to establish, at a later period, an inequality among the corporators. Each shareholder, by virtue of his contract as subscriber for or purchaser of stock, has a right in the net earnings equal, in proportion to the number of his shares, to that of every other shareholder; and the issue of preferred stock defeats this equal distribution of the net income, and impairs the vested rights of the holders of the ordinary stock. The weight of authority is against the power of the corporation, without special authority, to issue preferred stock,

¹ *Gray v. Portland Bank*, 3 Mass. 364 (1807); *Reese v. Bank of Montgomery*, 31 Pa. St. 78; *Eidman v. Bowman*, 58 Ill. 444; *Wheeler's Case*, 2 Abbott Pr. n. s. 361.

² *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294; *Curry v. Scott*, 54 Pa. St. 270; *Miller v. Ill. Cent. R. Co.*, 24 Barb. 312.

³ *Eidman v. Bowman*, 58 Ill. 444.

⁴ *Page v. Smith*, 48 Vt. 266.

⁵ *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536, 545, 546; *Burt v. Rattle*, 31 Ohio St. 116. See *Harrison v. Mexican R. Co.*,

L. R. 19 Eq. Cas. 358; *Bangor & P. S. & S. Co., In re*, L. R. 20 Eq. Cas. 59. It has sometimes been treated as only a mode of borrowing money. *West Chester & P. R. Co. v. Jackson*, 77 Pa. St. 321. The preferred stock is sometimes issued to creditors, and the corporate debt is thus converted into stock. *Bailey v. Hannibal & St. J. R. Co.*, 17 Wall. 96. 1 Dill. 174; *St. John v. Erie R. Co.*, 22 Wall. 136, 10 Blatch. 271. The holders of such stock sometimes become creditors by its conversion into bonds. *Totten v. Tison*, 54 Ga. 139.

after the original capital has been obtained.¹ A shareholder may waive his right to object to the issue of preferred stock, where the statute does not prohibit it, by formal assent or acquiescence.²

Dividends on Preferred Stock.—The dividends on preferred stock are payable only out of net earnings which are applicable to the payment of dividends; and the interest on the bonded or other interest-bearing debt, even though contracted after the issue of the preferred stock, and the rent upon leases made after the issue thereof, should be first paid.³ The preferred stockholders have no lien on the property and franchises against the bondholders under a mortgage, even when made subsequently to the issue of the preferred stock.⁴ The preferred stockholders, according to the plan usually adopted, after being paid their dividends, have no share in a further dividend from the same net profits until the ordinary stockholders are paid a certain dividend to which they are by the plan entitled.⁵

An agreement to pay dividends on preferred stock, except out of net earnings, is against public policy and void.⁶ The preferred stockholder is entitled to his dividend out of net income whenever accruing; and if there is a deficit one year, which prevents a dividend, he is entitled to a dividend for such year from the

¹ *Kent v. Quicksilver M. Co.*, 78 N. Y. 159, 12 Hun, 53; *Harrison v. Mexican R. Co.*, L. R. 19 Eq. Cas. 358; *Hutton v. Scarborough Cliff Hotel Co.*, 2 Drewry & S. 521; *Sturge v. Eastern Union R. Co.*, 7 De Gex, M. & G. 158; *Moss v. Syers*, 32 Law J. Ch. 711 (1863), 11 Weekly Rep. 1046. *Contra*, *Hazelhurst v. Savannah, G., & N. A. R. Co.*, 43 Ga. 13. See *Stevens v. South Devon R. Co.*, 9 Hare, 813.

² *Kent v. Quicksilver M. Co.*, 78 N. Y. 159, 12 Hun, 53; *Hoyt v. Quicksilver M. Co.*, 17 Hun, 169; *Hazelhurst v. Savannah, G., & N. A. R. Co.*, 43 Ga. 13, 54; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Branch v. Atlantic & G. R. Co.*, 3 Woods, 481.

³ *Bates v. Androscoggin & K. R. Co.*, 49 Me. 491; *Bailey v. Hannibal & St. J. R. Co.*, 17 Wall. 96, 1 Dill. 174; *St. John v. Erie R. Co.*, 22 Wall. 136, 10 Blatch. 271; *Union Pacific R. Co. v. United States*, 99 U. S. 402; *Taft v. Hartford, P., & F. R. Co.*, 8 R. I. 310. As to what

deductions are to be made from gross earnings, in order to find the net earnings, and the distinction between expenses for construction and ordinary expenses, see *Union Pacific R. Co. v. United States*, 99 U. S. 402, 418; *Corry v. Londonderry & E. R. Co.*, 29 Beav. 263; *Bouch v. Seven Oaks, M., & T. R. Co.*, L. R. 4 Exch. Div. 133; *Mills v. Northern R. Co.*, L. R. 5 Ch. App. 621.

⁴ *King v. Ohio & M. R. Co.* (U. S. C. C., D. Ind., Feb. 1880), 12 Chicago Leg. News, 219, 9 Reporter, 431.

⁵ *Bailey v. Hannibal & St. J. R. Co.*, 17 Wall. 96, 1 Dill. 74. As to the effect of a consolidation on dividends which were in arrears at the time it took place, see *Chase v. Vanderbilt*, 62 N. Y. 307, 37 N. Y. Superior, 334; *Prouty v. Lake Shore & M. S. R. Co.*, 52 N. Y. 363, 1 Hun, 655.

⁶ *Lockhart v. Van Alstyne*, 31 Mich. 76. Parol evidence is not admissible to vary the written agreement. *Bailey v. Hannibal & St. J. R. Co.*, 17 Wall. 96, 1 Dill. 174.

profits of succeeding years, before any dividend can be made on the common stock.¹ But some agreements confine the right to such dividends to the earnings of the current year.² Preferred stockholders may enforce their right to a dividend by a bill in equity,³ and, according to some authorities, by an action at law.⁴ They are not entitled to equitable remedies to prevent the corporation creating a lien on the road to secure a debt, the interest of which is to be paid before dividends can be declared on the preferred stock.⁵

Interest upon Capital Stock. — The payment of interest upon shares of the capital stock, except out of net income, is manifestly against public policy. In effect it reduces the capital stock itself, or involves the borrowing of money by the corporation to pay interest to its own members, and virtually to itself. It is equivalent to a dividend declared without funds from which it can be lawfully made. Such a payment is therefore illegal, except by express authority of statute.⁶ But the payment of interest out of net income, during the period that subscriptions are being taken, is a fair mode of adjusting the right of stockholders who pay at different times.⁷

¹ *Prouty v. Mich. S. & N. I. R. Co.*, 1 Hun, 655, 4 Thomp. & C. 230, 52 N. Y. 363; *Lockhart v. Van Alstyne*, 31 Mich. 76; *Taft v. Hartford, P., & F. R. Co.*, 8 R. I. 310, 334; *Henry v. Great Northern R. Co.*, 4 Kay & J. 1, 1 De Gex & J. 606; *Crawford v. North Eastern R. Co.*, 3 Kay & J. 723; *Corry v. Londonderry & E. R. Co.*, 29 Beav. 263; *Coates v. Nottingham Water Works Co.*, 30 Beav. 86; *Sturge v. Eastern Union R. Co.*, 7 De Gex, M. & G. 158; *Webb v. Earle*, L. R. 20 Eq. Cas. 556. As to priority in a division of the assets upon a winding up of the corporation, see *London India Rubber Co.*, *In re*, L. R. 5 Eq. Cas. 519; *Bangor & P. S. & S. Co.*, *In re*, L. R. 20 Eq. Cas. 59.

² *St. John v. Erie R. Co.*, 22 Wall. 136, 10 Blatch. 271. See *Union Pacific R. Co. v. United States*, 99 U. S. 402, 426.

³ *Bailey v. Hannibal & St. J. R. Co.*, 13 Wall. 136, 1 Dill. 174; *St. John v. Erie R. Co.*, 22 Wall. 136, 10 Blatch. 271; *Thompson v. Erie R. Co.*, 45 N. Y. 468, 11 Abbott Pr. n. s. 188; *Prouty v. Mich. S. & N. I. R. Co.*, 4 Thomp. & C. 230, 1

Hun, 655, 52 N. Y. 363. See *Richardson v. Vt. & M. R. Co.*, 44 Vt. 613.

⁴ *Bates v. Androscoggin & K. R. Co.*, 49 Me. 491; *West Chester & P. R. Co. v. Jackson*, 77 Pa. St. 321. But see *Williston v. Mich. S. & N. I. R. Co.*, 13 Allen, 400.

⁵ *Thompson v. Erie R. Co.*, 11 Abbott Pr. n. s. 188, 45 N. Y. 468.

⁶ *Miller v. Pittsburg & C. R. Co.*, 40 Pa. St. 237, 239; *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126, 136; *Painesville & H. R. Co. v. King*, 17 Ohio St. 534; *Troy & B. R. Co. v. Tibbets*, 18 Barb. 297; *Macdougall v. Jersey Imperial Hotel*, 2 Hem. & M. 528. But see *Milwaukee & N. I. R. Co. v. Field*, 12 Wis. 340; *Racine County Bank v. Ayers*, 12 Wis. 512; *Evansville, I., & C. S. L. R. Co. v. Evansville*, 15 Ind. 395, 415; *McLaughlin v. Detroit & M. R. Co.*, 8 Mich. 100.

⁷ *Wright v. Vt. & M. R. Co.*, 12 Cush. 68, 75; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536, 544; *Richardson v. Vt. & M. R. Co.*, 44 Vt. 613, 618.

It is sometimes provided by statute or agreement that interest shall be payable on stock until the completion of the road, or it is opened for use; ¹ and when so provided, the agreement does not create an absolute liability, or put the stockholder on the footing of a creditor, but by true construction the interest is payable only out of earnings which are available for dividends.²

The right of a stockholder to an interest dividend payable at a future time, if the corporation is able to pay it, depends on the ability of the corporation, which is to be judicially determined.³

The power to increase the capital stock within the limits allowed by statute is usually to be exercised by the stockholders, and not by the directors.⁴

A corporation, even a foreign one, may be enjoined from issuing certificates of stock beyond the lawful limit.⁵

Money paid to a corporation for shares of stock which were part of a contemplated illegal issue, may be recovered by the subscriber who has not received his shares.⁶

Overissues of Capital Stock. — The amount of capital stock and the number of shares, when fixed by law, cannot be increased either by the formal act of the corporation, or by the unauthorized or fraudulent act of its officers and agents. An overissue of stock being thus void, the *bona fide* purchasers of spurious certificates do not become stockholders. A corporation being, however, responsible like a natural person for the torts of its agents while engaged in the course of their employment, although they may at the time exceed the powers conferred by the charter, is liable in damages to innocent purchasers of shares which have been issued in excess of the legal limit of the capital stock, by agents authorized to issue certificates. Where it has conferred

¹ *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126; *McManus v. Phila. & R. R. Co.*, 58 Pa. St. 330; *Ohio City v. Cleveland & T. R. Co.*, 6 Ohio St. 489; *McLaughlin v. Detroit & M. R. Co.*, 8 Mich. 100.

² *Wright v. Vt. & M. R. Co.*, 12 Cush. 68; *Waterman v. Troy & G. R. Co.*, 8 Gray, 433; *Cunningham v. Vt. & M. R. Co.*, 12 Gray, 411; *Barnard v. Vt. & M. R. Co.*, 7 Allen, 512; *Richardson v. Vt. & M. R. Co.*, 44 Vt. 613; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536, 543; *Painesville & H. R. Co. v. King*, 17 Ohio St. 534.

³ *Barnard v. Vt. & M. R. Co.*, 7 Allen, 512.

⁴ *Ante*, p. 33.

⁵ *O'Brian v. Chicago, R. I., & P. R. Co.*, 36 How. Pr. 24; *Fisk v. Chicago, R. I., & P. R. Co.*, 36 How. Pr. 20, 53 Barb. 513; *Belmont v. Erie R. Co.*, 52 Barb. 637. The jurisdiction for this purpose over a foreign corporation is questionable. See *ante*, Chap. I. p. 15.

⁶ *Knowlton v. Congress & E. S. Co.*, 14 Blatch. 364. *Contra*, s. c., 57 N. Y. 518.

the authority to issue certificates, it is liable for its abuse to innocent persons. The limitation of the agent's authority by extrinsic facts, which from their nature are particularly within his knowledge, — as that it is to be exercised only in case of a transfer of shares and a surrender of the certificate, — does not relieve the corporation which is bound by his representation that those facts exist, and such representation is implied from his act of issuing the certificates. The liability of the corporation for such spurious certificates being founded on an unlawful act and resulting injury, may be enforced without further privity by any *bona fide* holder, whether the certificates were issued directly to him or to others from whom his title is derived.¹

The same rule of corporate liability for overissued shares applies where the officers issued the certificate originally to themselves in the same form as to stockholders generally.²

The burden of proof is on the corporation to show, in an action against it for refusing to transfer stock, that a certificate signed by its proper agents does not represent genuine stock.³

Where the corporation has issued the full number of shares, it cannot recover on subscriptions of additional stock,⁴ and a subscriber cannot acquire title thereto by a subscription.⁵

¹ New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 17 N. Y. 592, 38 Barb. 534; Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 231; Bruff v. Mali, 36 N. Y. 200; Titus v. Great Western Turnp. R. Co., 61 N. Y. 237; Blatchford v. New York & N. H. R. Co., 5 Abbott Pr. 276; Cazeaux v. Mali, 25 Barb. 578. See Seizer v. Mali, 32 Barb. 76, 6 Abbott Pr. 270, note; Hall v. Rose Hill & E. Road Co., 70 Ill. 673. The doctrine of the text is contained in elaborate judgments relating to the overissue of the stock of the New York and New Haven Railroad Company by R. Schuyler, its president and transfer agent. In the early stage of the litigation his agency appeared by the evidence to be limited to an issue of certificates where there was a transfer of shares on the company's books, accompanied by a surrender of the previous owner's certificate, and, according to this view of the facts, the corporation was considered not liable for his issue of certificates, without such transfer and surrender. Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599, 4 Duer,

484; Henning v. New York & N. H. R. Co., 9 Bosw. 283. But in the later case of New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, his authority was found to have been more general, and to have extended to the issuing of certificates in the same form to original subscribers and purchasers where there was no such transfer and surrender. The corporation was held chargeable with the negligence of its directors, who with proper diligence could have prevented the fraud in question.

As to issuing bonds in excess of the aggregate amount secured by a mortgage, containing the recital that they are so secured, see Stephens v. Benton, 1 Duvall, 112.

² Titus v. Great Western Turnp. Road, 61 N. Y. 237, 5 Lans. 250.

³ Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 231. See Merrill v. Gamble, 46 Iowa, 615; Merrill v. Reaver, 50 Iowa, 404.

⁴ McCord v. Ohio & M. R. Co., 13 Ind. 220.

⁵ Lathrop v. Kneeland, 46 Barb. 432.

The corporation may, where the overissued shares are held by numerous parties, maintain as the proper representative of the genuine stockholders a bill in equity against the holders of the disputed certificates to test their validity, to procure a cancellation of those found to be spurious, and to determine the liability of the corporation in damages to such holders. This remedy is applied in order to remove a cloud from the titles of the lawful owners, and as a bill of peace to quiet titles and prevent a multiplicity of actions. Such a suit may be maintained by a foreign as well as a domestic corporation.¹

Lien of the Corporation. — At common law the corporation has no lien on a stockholder's shares for debts owing by him to it, and cannot obtain such lien by a by-law assuming to give it;² but the right is sometimes given by statute.³ A power given by statute to regulate the transfer of stock has been held to authorize a by-law which conferred the lien.⁴ The lien exists only against a record-owner.⁵ A lien, when existing, will prevail against a vendee whose title has not been recorded on the books as provided by the by-laws;⁶ but it will not prevail in favor of claims of the corporation arising subsequent to its being notified of the sale.⁷

¹ *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592, 34 N. Y. 30. There were three hundred and twenty-six defendants in this suit. See *Venice v. Woodruff*, 62 N. Y. 462, 470; *Lehigh Valley R. Co. v. McFarlan*, 4 Stewart (N. J.), 730.

² *Bank of Attica v. Manufacturers' Bank*, 20 N. Y. 501; *Driscoll v. West B. & C. Man. Co.*, 59 N. Y. 96, 36 N. Y. Superior, 488; *Steamship Dock Co. v. Heron*, 52 Pa. St. 280; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; *Farmers' & M. Bank v. Wasson*, 48 Iowa, 336. *Contra*, *Pendergrast v. Stockton*, 2 Sawyer, 108; *Bachman's Case*, 12 Nat. Bank. Reg. 223. See *Bank v. Lanier*, 11 Wall. 369; *Bullard v. Bank*, 18 Wall. 589, 594; *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 2 Biss. 527; *Conklin v. Second Nat. Bank*, 45 N. Y.

655; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. 495; *Hagar v. Union Nat. Bank*, 63 Me. 509.

³ *Pittsburg & C. R. Co. v. Clarke*, 29 Pa. St. 146; *Reese v. Fisher*, 14 Md. 271.

⁴ *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; *Geyer v. Western Ins. Co.*, 3 Pittsburg, 41. A by-law when giving a lien will operate only prospectively. *People v. Crockett*, 9 Cal. 112.

⁵ *Helm v. Swigget*, 12 Ind. 194. But see *Stebbins v. Phoenix Fire Ins. Co.*, 3 Paige, 350.

⁶ *Union Bank v. Laird*, 2 Wheat. 390.

⁷ *Conant v. Seneca County Bank*, 1 Ohio St. 298.

CHAPTER VI.

PURCHASE OF RIGHT OF WAY, AND AGREEMENTS WITH LAND-OWNERS.

THE power of a railroad corporation to purchase real estate or interests therein for its purposes is usually conferred by statute, but, if not expressly granted, it may be inferred as incidental to the general powers of the corporation limited in each case to its legitimate purposes.¹

Title or Interest acquired.— A railroad company may acquire by purchase a title in fee to lands necessary for its use, and convey the same title.² It will acquire a fee as the grantee in a deed conveying land in the terms by which a fee is granted to individuals.³ It may convey under authority of law to another corporation the interest in land which it has acquired by purchase for a right of way, to be used by the purchaser for the same purpose.⁴ A deed of a right of way to the company grants, where the intention to convey a fee does not appear, a perpetual easement.⁵ A conveyance for railroad purposes creates a qualified or determinable fee liable to be divested if the estate is used for other purposes.⁶

Statute of Frauds.— An action at law will not lie against the company for the price of land sold to it, where no written contract conforming to the requirements of the Statute of Frauds has been entered into between the parties, subscribed by the vendor, and assented to or accepted by the purchaser.⁷

¹ *Post*, Chap. XIX., CORPORATE POWERS, p. 505.

² *Nicoll v. New York & E. R. Co.*, 12 N. Y. 121, 12 Barb. 460; *Heath v. Barmore*, 50 N. Y. 302; *Hill v. Western Vt. R. Co.*, 25 Vt. 68; *State v. Brown*, 3 Dutcher, 13; *Holt v. Somerville*, 127 Mass. 408.

³ *Page v. Heineberg*, 40 Vt. 81; *Yates v. Van de Bogert*, 56 N. Y. 526.

⁴ *Harrison v. Lexington & F. R. Co.*, 9

B. Monr. 470; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1; *Pollard v. Maddox*, 28 Ala. 321; *Southard v. Central R. Co.*, 2 Dutcher, 13; *New Jersey Midland R. Co. v. Van Syckle*, 8 Vroom, 496.

⁵ *Junction R. Co. v. Ruggles*, 7 Ohio St. 1. See *Nicoll v. New York & E. R. Co.*, 12 N. Y. 121, 12 Barb. 460.

⁶ *State v. Brown*, 3 Dutcher, 13.

⁷ *Reynolds v. Dunkirk & S. L. R. Co.*, 17 Barb. 613.

Rights in Land under a License. — A permanent interest in land by way of easement cannot be acquired by a parol license. Thus, a license to lay railroad tracks and construct other works on a person's land, or to erect structures within the company's location which would otherwise be an actionable nuisance, is revocable;¹ and the license may be revoked as well by a subsequent owner of the land as by the land-owner who gave it.² It will, however, until revoked, justify the acts coming within it;³ but the licensee is liable for injuries arising from want of care and skill.⁴ The mere non-user of an easement duly acquired will not impair the right to it.⁵ The deed of an easement is not revocable.⁶ The company may, on a license being revoked, remove the rails which it has laid on the track;⁷ but if they are laid wrongfully, they become a part of the realty, and it cannot enter to remove them.⁸

Distinctions have been admitted in some jurisdictions, though denied elsewhere, in favor of executed licenses, particularly where expense has been incurred by the licensee, and also in favor of acts done under a license on the land of the licensee; but it does not seem necessary to dwell on them in this connection.⁹

¹ *Miller v. Auburn & S. R. Co.*, 6 Hill, 61; *Selden v. Delaware & H. Canal Co.*, 29 N. Y. 634, 24 Barb. 362; *Murdock v. Prospect Park & C. I. R. Co.*, 73 N. Y. 579; *Eggleston v. New York & H. R. Co.*, 35 Barb. 162; *Hetfield v. Central R. Co.*, 5 Dutcher, 571, 206; *Foot v. New Haven & N. R. Co.*, 23 Conn. 214; *Mathews v. St. Paul & S. C. R. Co.*, 18 Minn. 434; *Blaisdell v. Portsmouth, G. F., & C. R. Co.*, 51 N. H. 483; *Irish v. B. & S. W. R. Co.*, 44 Iowa, 380; *Hosher v. Kansas City, St. J., & C. R. Co.*, 60 Mo. 329; *Stevens v. Stevens*, 11 Met. 251; *Morse v. Copeland*, 2 Gray, 302; *Batchelder v. Hibbard*, 58 N. H. 269. See *Hamilton & R. Hydraulic Co. v. Cincinnati, H., & D. R. Co.*, 29 Ohio St. 341.

² *Foot v. New Haven & N. Co.*, 23 Conn. 214.

³ *Miller v. Auburn & S. R. Co.*, 6 Hill, 61; *Selden v. Delaware & H. Canal Co.*, 29 N. Y. 634, 24 Barb. 362; *Foot v. New Haven & N. Co.*, 23 Conn. 214; *Blaisdell v. Portsmouth, G. F., & C. R. Co.*, 51 N. H. 483; *Louisville & N. R. Co. v. Thompson*, 18 B. Monr. 735.

⁴ *Selden v. Delaware & H. Canal Co.*, 29 N. Y. 634.

⁵ *Barlow v. Chicago, R. I., & P. R. Co.*, 29 Iowa, 276; *Veghte v. Raritan Water Power Co.*, 4 C. E. Green, 142, 156, 6 C. E. Green, 463, 480.

⁶ *New Jersey Midland R. Co. v. Van Syckle*, 8 Vroom, 496; *Hudson v. Leeds & B. R. Co.*, 16 Q. B. 796.

⁷ *Northern Cent. R. Co. v. Canton County*, 30 Md. 347; *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 82; *Dietrich v. Murdock*, 42 Mo. 279.

⁸ *Merriam v. Brown*, 128 Mass. 391.

⁹ *Trenton Water Power Co. v. Chambers*, 1 Stock. 471; *Veghte v. Raritan Water Power Co.*, 4 C. E. Green, 142, 6 C. E. Green, 463; *Central R. Co. v. Hetfield*, 5 Dutcher, 206; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 23; *Thompson v. McElarney*, 82 Pa. St. 174; *Foot v. New Haven & N. Co.*, 23 Conn. 214; *Batchelder v. Hibbard*, 58 N. H. 269; *Baker v. Chicago, R. I., & L. P. R. Co.*, 57 Mo. 265; *Hosher v. Kansas City, St. J., & C. B. R. Co.*, 60 Mo. 329; *Williamston & T. R. Co. v. Battle*, 66 N. C.

The company cannot grant an easement except by writing. Thus, it is not bound by a parol agreement to maintain a turnout and station at a certain place, and stop trains there;¹ or to lay down a track on the railroad alongside of the adjoining owner's land, and deliver and receive stock thereon.²

The use by the company of a piece of land for a location is not notice to a subsequent *bona fide* purchaser of an unrecorded grant to the company.³

State Grants.—Grants of land, like other grants from the State, are, when ambiguous in terms, construed in favor of the State, and nothing passes, beyond what is clearly expressed. The grant is irrevocable, but it does not imply a warranty, and only the estate passes which the State had at the time.⁴ The validity of the grant can be contested, and a cause of forfeiture taken advantage of only in a direct proceeding by the State.⁵ A general grant of public lands, usually in alternate sections, by the United States for the purpose of aiding a railroad will be construed to exclude land previously appropriated to another purpose. Thus, where the road is to pass through Indian reservations, the grant will not give a title to alternate sections in territory set apart for the use of an Indian tribe under a treaty.⁶

Construction of Grants to the Company.—A grant to the company for its purpose carries with it, so far as the grantor can confer it, an authority to do all that is necessary to accomplish

540; *Macon & A. R. Co. v. Bowen*, 45 Ga. 531; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453; *Cape Girardeau & B., M., & G. R. Co. v. Renfro*, 58 Mo. 265; *Washburn's Easements & Servitudes*, ch. i. § 2, p. *19, ch. v. § 7, p. *560; *Washburn on Real Property*, vol. i. bk. i. ch. 12, § 2, pp. 628-640, 3 Kent Com. p. 462 [604], note.

¹ *Pitkin v. Long Island R. Co.*, 2 Barb. Ch. 221.

² *Day v. New York Cent. R. Co.*, 31 Barb. 548.

³ *Merritt v. Northern R. Co.*, 12 Barb. 605. But see *Paul v. Connersville & N. J. R. Co.*, 51 Ind. 527.

⁴ *Dubuque & P. R. Co. v. Litchfield*, 23 How. 66; *Rice v. Minnesota & N. R. Co.*, 1 Black, 350. As to the construction

of various grants by the United States for railroads, see *State v. Kirkwood*, 14 Iowa, 162; *Fremont & M. Counties v. Burlington & M. R. Co.*, 22 Iowa, 91; *Leavenworth, L., & G. R. Co. v. United States*, 92 U. S. 733; *Newhall v. Sanger*, 92 U. S. 761; *United States v. Burlington & M. R. Co.*, 98 U. S. 334; *Ryan v. Central Pacific R. Co.*, 99 U. S. 382, 5 Sawyer, 260; *Railway Co. v. Alling*, 99 U. S. 463; *Denver & R. G. R. Co., In re*, 101 U. S. 711; *Atchison, T., & S. F. R. Co. v. Mecklin*, 23 Kan. 167.

⁵ *Parmelee v. Oswego & S. R. Co.*, 7 Barb. 599; *Chicago, R. I., & P. R. Co. v. Grinnell*, 51 Iowa, 476.

⁶ *Leavenworth, L., & G. R. Co. v. United States*, 92 U. S. 733. See *Grintner v. Kansas Pacific R. Co.*, 23 Kan. 642.

the principal object. Thus, the grant of full license and authority to locate, construct, repair, and forever maintain and use a railroad over the grantor's land, and to take his land therefor to the extent authorized by the charter, empowers the company to lay ditches in connection with culverts, which extend into his land, and to deepen the bed of a mountain stream in his land; such excavations, although beyond the limits of its location, being necessary to the construction and maintenance of the road.¹ A deed of land to the company will carry with it the privileges then appurtenant to it, and parol evidence is inadmissible to show that they were excluded by the agreement.² A grant of an easement, as to lay a pipe for a watercourse, made in general and indefinite terms, will become fixed and certain, as to place and extent, by the selection or acts of the parties.³

Conveyances and bonds to convey land to a railroad corporation are, unless a contrary intent appears, construed, as to the quantity and estate, with reference to the power to take land under the right of eminent domain. Thus, the bond of a landowner to sell such land owned by him as should be required for the road was held to bind him only to convey such land as was required for depot accommodations, and such an easement therein as could be taken; but as to the quantity required for the purpose, the decision of the directors, acting in good faith, was held not open to judicial revision.⁴ Land conveyed to a company will be presumed to have been acquired for its purposes.⁵

A deed of land to the company for its location is presumed to include a license to do what is lawful in the construction and management of its road, to the same extent and with the same effect as if the land had been compulsorily taken; and it is therefore construed to release a claim for injury to other land of the grantor, or for other damages to which he would have been entitled if the land had been taken by proceedings *in invitum*.⁶

¹ Babcock v. Western R. Co., 9 Met. 553; Central R. Co. v. Valentine, 5 Dutcher, 561, 60. See Elliot v. Eastern R. Co., 10 H. L. Cas. 333.

² Vermont Cent. R. Co. v. Hills, 23 Vt. 681; Central R. Co. v. Valentine, 5 Dutcher, 561, 60. Land does not pass as appurtenant to land. New York Cent. R. Co. v. Buffalo & N. Y. & E. R. Co., 49 Barb. 501.

³ Onthank v. Lake Shore & M. S. R. Co., 71 N. Y. 194, 8 Hun, 131.

⁴ Hill v. Western Vt. R. Co., 32 Vt. 68.

⁵ Yates v. Van de Bogert, 56 N. Y. 526.

⁶ Norris v. Vt. Cent. R. Co., 28 Vt. 99; Rood v. New York & E. R. Co., 18 Barb. 80; Conwell v. Springfield & N. R. Co., 81 Ill. 232; Hortsman v. Lexington & C. R. Co., 18 B. Monr. 218; Boothby v. Androscoggin R. Co., 51 Me. 318. See Eaton v. Boston, C., & M. R., 52 N. H. 504.

But, notwithstanding the deed, the company remains liable for injuries arising from the negligent and unskilful construction of its road.¹

The company may use for railroad purposes the land conveyed to it for a location, although such use may be incidentally injurious to the land-owner. Thus, it can dig a well which diminishes the supply of water in a spring on the grantor's land.² But it has no right to enter on his land, except as authorized by the deed.³

A deed of land described as covered by "the location of the railroad," which had not yet been made, will convey what is thereafter fixed upon under an existing power, but not land which is covered by a new location adopted under a power obtained by a subsequent statute.⁴

Reservations in deeds to the company are to be construed so as to adjust reasonably the rights of the grantor with the purposes and operations of the company.⁵ The reservation of a right by the grantor to mow and cultivate the land conveyed to the railroad, includes a personal privilege or right to enjoy profits, but not an easement appurtenant to the remaining portion of his land.⁶ A clause in a deed of land to a railroad corporation, "reserving to myself the right of passing and repassing and repairing my aqueduct logs forever, through a culvert six feet wide and rising in height to the superstructure of the railroad, to be built and kept in repair by said company," operates as a reservation, and not as an exception, and vests in the grantor an estate for life only.⁷

A grantor, conveying land to the company for railroad purposes, does not retain the right to support for his adjoining land.⁸ The company, under English acts, obtains by deed the right to support.⁹

¹ Hatch v. Vt. Cent. R. Co., 25 Vt. 49, 70; Hortsman v. Lexington & C. R. Co., 18 B. Monr. 218; Jacksonville, N., & S. R. Co. v. Cox, 91 Ill. 500; Ludlow v. Hudson River R. R. Co., 6 Lans. 128.

² Hougau v. Milwaukee & St. P. R. Co., 35 Iowa, 558.

³ Hills v. Boston & M. R. Co., 18 N. H. 179.

⁴ Hall v. Pickering, 40 Me. 548.

⁵ Central R. Co. v. Valentine, 5 Dutcher, 561, 60.

⁶ Pierce v. Keator, 70 N. Y. 419.

⁷ Ashcroft v. Eastern R. Co., 126 Mass. 196.

⁸ Ludlow v. Hudson River R. Co., 4 Hun, 239; Ryckman v. Gillis, 57 N. Y. 68, 6 Lans. 79; Babcock v. Western R. Co., 9 Met. 553; Hortsman v. Lexington & C. R. Co., 18 B. Monr. 219; Boothby v. Androscoggin R. Co., 51 Me. 318; Eaton v. Boston, C., & M. R., 51 N. H. 504, 524.

⁹ North Eastern R. Co. v. Crossland, 2 John. & H. 535; Elliot v. North Eastern R. Co., 10 H. L. Cas. 333.

The corporation cannot obtain a title by acts of land-owners which would effect a dedication to the public use for a highway.¹

Covenants running with the Land. — The land-owner may, by a covenant running with the land, bar the claims of himself and subsequent owners for damages arising from the unskilful construction of the company's works.² The company may, by a covenant running with the land, bind itself to maintain at certain places stations or farm crossings, either by an instrument signed by itself, or by accepting a deed which imposes the obligation.³

Covenants which from their nature do not inhere in the land cannot be attached to it at the caprice of owners. Thus, a covenant of the company to have a terminus at a certain place, and not to extend the road beyond it, will not bind another corporation which succeeds to the ownership of the road.⁴ So, also, the covenant of the owner of a quarry near the railroad to transport its products over the railroad does not bind a subsequent owner of the quarry.⁵

Covenants and Conditions. — Words which are not in form either a covenant or a condition will be construed as one or the other, where, without such a construction, the party for whose benefit the provision is made would be without remedy.⁶ Whether a provision is to be construed as a covenant or a condition is to be determined by its legal character; and if it appears to be in form and terms a condition, an erroneous impression of the parties as to its effect, or even their use of the word "covenant," will not make it a covenant.⁷ A mere stipulation in a deed to the company that it is to maintain the fences is not a condition.⁸ Equity, it has been held, will enforce specific performance of conditions.⁹

¹ *Todd v. Pittsburg, Ft. W., & C. R. Co.*, 19 Ohio St. 514.

² *Van Rensselaer v. Albany & S. R. Co.*, 1 Hun, 507, 3 T. & C. 620.

³ *Aikin v. Albany, V., & C. R. Co.*, 26 Barb. 289; *Georgia Southern R. Co. v. Reeves* (Ga. S. C.), 10 Reporter, 361.

⁴ *Lynn v. Mount Savage Iron Co.*, 34 Md. 603.

⁵ *Keppell v. Bailey*, 2 Mylne & K. 517; *Ackroyd v. Smith*, 10 C. B. 164, 187, 188.

See *Hemingway v. Fernandes*, 13 Sim. 228.

⁶ *Aikin v. Albany, V., & C. R. Co.*, 26 Barb. 289.

⁷ *Blanchard v. Detroit, L., & L. M. R. Co.*, 31 Mich. 43.

⁸ *Hornback v. Cincinnati & Z. R. Co.*, 20 Ohio St. 81.

⁹ *Aikin v. Albany, V., & C. R. Co.*, 26 Barb. 289; *Hubbard v. Kansas City, St. J., & C. B. R. Co.*, 63 Mo. 68.

The most frequent conditions in deeds to a railroad company (usually conditions subsequent) are such as provide for a particular location or site for a station.¹ A condition is entire, and the grantor on a re-entry for a breach takes the whole land granted.² A condition that a part of the land shall be kept open for a public street is valid.³ A contract to convey land to a company, on condition that a certain location of the road or a certain site for a station is adopted, is not against public policy.⁴

Conditions Precedent or Subsequent. — Land may be conveyed to a railroad company for its purposes, on a condition precedent or subsequent; and to which class the condition is to be referred does not depend on technical words, but will be determined from the nature of the transaction and the intention of the parties as appearing from the conveyance.⁵ If the act or condition does not necessarily precede the vesting of the estate, but may accompany or follow the vesting, and may as well be performed after as before the vesting; or if, from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, — then the condition is subsequent.⁶ A breach of a condition subsequent works a forfeiture. Thus, the grantor or his heirs may recover land conveyed to the company for the permanent location of a station when it is abandoned by the company for that purpose.⁷

The breach of the condition where the grant is in fee may be taken advantage of by the grantor and his heirs, but not by a person to whom he has conveyed his interest before or after the breach;⁸ or even by the heir when claiming under a deed.⁹ Conditions subsequent are not favored in law, and will receive a strict construction. The omission to perform the condition

¹ *Taylor v. Cedar Rapids & St. P. R. Co.*, 25 Iowa, 371; *Jenkins v. Burlington & M. R. Co.*, 29 Iowa, 255; *Blanchard v. Detroit, L., & L. M. R. Co.*, 31 Mich. 43. See, as to the construction of conditions in subscriptions, *ante*, Chap. III. p. 62.

² *Tinkham v. Erie R. Co.*, 53 Barb. 393.

³ *Id.*

⁴ *McClure v. Mo. River, F. S., & G. R. Co.*, 9 Kan. 373. But see Chap. XIX. p. 513.

⁵ *Nicoll v. New York & E. R. Co.*, 12

N. Y. 121. See *Sayer v. New York & H. R. Co.*, 3 Duer, 54.

⁶ *Parmelee v. Oswego & S. R. Co.*, 6 N. Y. 74, 7 Barb. 599; *Underhill v. Saratoga & W. R. Co.*, 20 Barb. 455.

⁷ *Indianapolis, P., & C. R. W. Co. v. Hood*, 66 Ind. 580.

⁸ *Underhill v. Saratoga & W. R. Co.*, 20 Barb. 455; *Nicoll v. New York & E. R. Co.*, 12 N. Y. 121; *Paul v. Connersville & N. J. R. Co.*, 51 Ind. 527.

⁹ *Rice v. Boston & W. R. Co.*, 12 Allen, 141.

in a deed which vests the fee-simple does not *ipso facto* determine the estate, but only renders it liable to be defeated at the election of the grantor and his heirs, to be signified by some act equivalent to a re-entry at common law.¹ The forfeiture for a breach may be waived, and, when once waived, the court will not assist it. Thus, a condition that the conveyance shall be void if the railroad is not completed by a certain day, may, where it is completed at a later day, be waived by acts of the grantor, showing his acquiescence and recognition of the corporation as the owner of the land conveyed by him.²

Equity will not lend its aid to enforce a forfeiture for breach of a condition subsequent; but where there is no adequate remedy at law, and the right is clear, it will take jurisdiction to cancel the deed as a cloud on the title of the grantor who has asserted his right to a forfeiture.³

Bonds to Convey; Specific Performance.—The company may obtain the right to land for its location and other purposes, by bonds or written contracts to convey. It may enforce in equity the specific performance of such contracts signed by parties agreeing to convey land to it,⁴ or to buy land of it.⁵ The contract cannot be enforced by a party who has signed it against one who has not signed it,⁶ but may be enforced against the signing party by the other party, who, though not signing, has acted upon the contract.⁷ The bond or contract to convey land to the company does not give it a right to enter on the land against the owner's will, but it must resort to its equitable remedy to obtain possession and a legal title.⁸

A decree of specific performance will not be granted where it is inequitable, but the party seeking it will be left to his remedy at

¹ *Memphis & C. R. Co. v. Neighbors*, 51 Miss. 412; *Nicoll v. New York & E. R. Co.*, 12 N. Y. 121; *Hall v. Pickering*, 40 Me. 548. See *Taylor v. Cedar Rapids & St. P. R. Co.*, 25 Iowa, 371. If the abandonment of the road is the condition, the breach must be judicially declared in order to be taken advantage of. *Harrison v. Lexington & O. R. Co.*, 9 B. Monr. 470.

² *Ludlow v. New York & H. R. Co.*, 12 Barb. 440; *Tinkham v. Erie R. Co.*, 53 Barb. 398.

³ *Memphis & C. R. Co. v. Neighbors*,

51 Miss. 412; *Vicksburg & M. R. Co. v. Ragsdale*, 54 Miss. 200.

⁴ *Boston & M. R. Co. v. Babcock*, 3 Cush. 228.

⁵ *Old Colony R. Co. v. Evans*, 6 Gray, 25.

⁶ *Jacobs v. Peterborough & S. R. Co.*, 8 Cush. 223; *Boston & M. R. v. Bartlett*, 10 Gray, 384.

⁷ *Old Colony R. Co. v. Evans*, 6 Gray, 25; *Western R. Co. v. Babcock*, 6 Met. 346.

⁸ *Whitman v. Boston & M. R.*, 3 Allen, 133; *Eggleston v. New York & H. R. Co.*, 35 Barb. 162.

law.¹ Thus, where the location of a railroad or highway, for which the land was purchased, is abandoned, the vendor, who has remained in possession, cannot maintain a bill for specific performance.²

The party seeking a specific performance must not be chargeable with laches, or have waited until there has been a change of circumstances which would make the decree inequitable.³ Nor will it be granted where the defendant shows that the agreement is void by proof of fraud or duress which would avoid it at law; or that, without any gross laches of his own, he was led into a mistake by an uncertainty or obscurity in the descriptive part of the agreement by which he in fact mistook one line or one monument for another, and the agreement applied to a different subject from what he understood at the time; or that the bargain was hard, unequal, or oppressive, and would operate in a manner different from what was in the contemplation of the parties when it was executed; but the burden of proof is on the defendant to show these facts. It is, however, no defence to a bill praying for specific performance that the consideration was inadequate, unless the inadequacy is so gross, and the proof of it so clear, as to lead to a reasonable conclusion of fraud or mistake. And where a person has stipulated, for a certain consideration, to permit a company to construct a railroad over his land, by any one of two or more routes, and upon the road being definitely located, to convey the land to the company for certain sums varying according to the route chosen by it, — he cannot defend against a bill for specific performance of his agreement, by showing that he was induced to believe, either by his own notions or the representations of third persons as to the preference of one route over another, that the company would select a route different from that finally adopted; nor by showing that the company or its agents had made representations as to the probability that one route would be adopted in preference to another, or as to the relative advantages of each route. All such matters must be considered as merged in the agreement; and if the land-owner intended to claim larger compensation

¹ *Coe v. New Jersey Midland R. Co.*, 4 Stewart (N. J.), 105.

² *Whitney v. New Haven*, 28 Conn. 624. See *Webb v. Direct London & P. R. Co.*, 9 Hare, 129, 1 De Gex, M. & G. 521; *Stuart v. London & N. W. R. Co.*, 15 Beav. 513, 1 De Gex, M. & G. 721;

Gooday v. Colchester, &c. R. Co., 17 Beav. 182.

³ *Boston & M. R. v. Bartlett*, 10 Gray, 384; *Missouri River, Ft. S., & G. R. Co. v. Brickley*, 21 Kan. 275; *Western R. Co. v. Babcock*, 6 Met. 346.

in case one route should be adopted rather than another, he should have stipulated for the alternative in the agreement. Nor can he allege a mistake which arose from his not reading or hearing the agreement read, when he had the means offered him of doing so.¹

Deeds of land to the company, made in payment of subscriptions for shares in the capital stock, may be set aside in equity when obtained by the fraud of the company.²

Equity will require the company to perform its agreement to make erections for the land-owner's benefit, although he may also have an action for damages.³

Equity will not specifically enforce agreements which are doubtful in meaning or indefinite and defective in important details, or leave material matters to the discretion of the party against whom a decree is sought.⁴ The remedy of specific performance is appropriate to the enforcement of obligations where it can take effect at once, and not where it involves a prolonged control of personal acts requiring skill and discretion, as in the case of agreements to run trains, or to stop them at stations, or to work railroads;⁵ but the breach of such a contract may be restrained by injunction.⁶

Where two railroad companies agreed together to build a road between certain points, and to meet each other at a given place, and to have the charges of transportation, the meeting of the cars and of the through freight trains, arranged by both companies in order to make a through business connection, an injunc-

¹ *Western R. Co. v. Babcock*, 6 Met. 346. As to mutual mistake in the description, see *Old Colony R. Co. v. Evans*, 6 Gray, 25.

² *Atlanta & W. P. R. Co. v. Hodnett*, 36 Ga. 669; *McClellan v. Scott*, 24 Wis. 81.

³ *Storer v. Great Western R. Co.*, 2 Younge & C. 48; *Wilson v. Furness R. Co.*, L. R. 9 Eq. Cas. 28; *Greene v. West Cheshire R. Co.*, L. R. 13 Eq. Cas. 44.

⁴ *Boston & M. R. v. Babcock*, 3 Cush. 228; *Blanchard v. Detroit, L., & L. M. R. Co.*, 31 Mich. 43; *Lexington & O. R. Co. v. Ormsby*, 7 Dana, 276; *South Wales R. Co. v. Wythes*, 5 De Gex, M. & G. 880, 1 Kay & J. 186; *Webb v. Direct London & N. W. R. Co.*, 1 De Gex, M. & G. 521, 9 Hare, 129; *Stuart v. London & N. W. R. Co.*, 1 De Gex, M. & G. 721, 15 Beav. 513; *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 419; *Hawkes v. Eastern Counties R. Co.*,

5 H. L. Cas. 331, 351-353, 355, 369, 377, 379, 1 De Gex, M. & G. 737, 757, 759.

⁵ *Port Clinton R. Co. v. Cleveland & T. R. Co.*, 13 Ohio St. 544; *Blanchard v. Detroit, L., & L. M. R. Co.*, 31 Mich. 43; *Marble Co. v. Ripley*, 10 Wall. 339, 358. See English cases, *Earl of Lindsey v. Great N. R. Co.*, 10 Hare, 664; *Shrewsbury & B. R. Co. v. Stour Valley R. Co.*, 2 De Gex, M. & G. 866; *Great Northern R. Co. v. Manchester, S., & L. R. Co.*, 5 De Gex & S. 138; *Storer v. Great Western R. Co.*, 2 Younge & C. 48; *Hood v. North Eastern R. Co.*, L. R. 8 Eq. Cas. 666; *Blackett v. Bates*, L. R. 2 Ch. App. 117.

⁶ *Western Union Tel. Co. v. Union Pacific R. Co.* (U. S. C. C., D. Kan.), 3 Fed. Rep. 423, 3 Fed. Rep. 721; *Coe v. Louisville & N. R. Co.* (U. S. C. C., M. D. Tenn.), 3 Fed. Rep. 775.

tion was granted at the suit of one to restrain the other from changing the gauge of its road so as to break the connection.¹

Specific performance of an agreement by the company to maintain cattle-guards will not be granted at the suit of the landowner.² It has, however, been considered a proper remedy, to be administered with discretion, to enforce a contract to maintain a turnout and side-track for the accommodation of the business of the owner of an adjacent warehouse.³ Equity will not enforce a specific performance which would interfere with the public safety or convenience.⁴

Resulting Trusts. — Equity will enforce resulting trusts created by the payment of the purchase-money from the funds of the company, and compel parties taking the legal title to convey the same to it.⁵

Remedy against the Company for Breach of its Contract of Purchase. — A breach of the contract by which a company has obtained land for its location does not make its possession unlawful. If the stipulation which it has not complied with is not a condition, the vendor's remedy is an action for the breach, and he cannot maintain an action of ejectment or trespass, or a bill in equity to restrain the company from using the land.⁶ The vendor has been held in some cases where there was such a breach entitled to an equitable lien on the estate sold,⁷ and even to an injunction to prevent an irreparable injury, from which the company had agreed to refrain.⁸

If the company enters on land under a contract of purchase which is not carried into effect, an action for use and occupation cannot be maintained against it.⁹

¹ *Columbus, P., & I. R. Co. v. Indianapolis & B. R. Co.*, 5 McLean, 450.

² *Columbus & S. R. Co. v. Watson*, 26 Ind. 50. But see *Aikin v. Albany, V., & C. R. Co.*, 26 Barb. 289. See *Gray v. Burlington R. Co.*, 37 Iowa, 119.

³ *Windham Man. Co. v. Hartford, P., & F. R. Co.*, 23 Conn. 373.

⁴ *Raphael v. Thames Valley R. Co.*, L. R. 2 Eq. Cas. 37.

⁵ *Church v. Sterling*, 16 Conn. 388; *Buffalo, N. Y., & E. R. Co. v. Lampson*,

47 Barb. 533; *Coe v. New Jersey Midland R. Co.*, 4 Stewart (N. J.), 105.

⁶ *Pusey v. Wright*, 31 Pa. St. 387; *Gallagher v. Fayette County R. Co.*, 38 Pa. St. 102; *Hornback v. Cincinnati & Z. R. Co.*, 20 Ohio St. 81; *Hubbard v. Kansas City, St. J., & C. B. R. Co.*, 63 Mo. 68; *Doe v. Leeds & B. R. Co.*, 16 Q. B. 796.

⁷ *Dayton, X., & B. R. Co. v. Lewton*, 20 Ohio St. 401; *McAulay v. Western Vt. R. Co.*, 33 Vt. 311.

⁸ *Unangst's Appeal*, 55 Pa. St. 128.

⁹ *Stacy v. Vt. Cent. R. Co.*, 32 Vt. 551.

Damages for Breach of Contract to convey. — In an action at law for breach of a contract for the sale of land, the measure of damages is the difference between the price fixed by the contract, and the market value at the time of the breach.¹

Where a person who has agreed to convey land, for a certain sum, to the company for its road, refuses to perform the agreement, and in a special proceeding obtains an assessment of his damages caused by the laying out of the road over his land, the measure of damages for which he is liable on the breach of his agreement has been held to be the excess of the sum assessed in the proceeding over the price fixed in the agreement.²

¹ *Old Colony R. Co. v. Evans*, 6 Gray, 25; *Boston & M. R. v. Bartlett*, 10 Gray, 384.
² *Western R. Co. v. Babcock*, 6 Met. 846.

CHAPTER VII.

LAND AND INTERESTS THEREIN ACQUIRED BY THE RIGHT OF EMINENT DOMAIN.

Source of the Power.—The right of eminent domain, or right to take private property for public use, has been referred to the feudal theory of tenure, to implied compact, and public necessity; but upon whatever principle it is asserted, it is an inherent sovereign power of the State.¹ Its limitations are that compensation must be made to the owner, or otherwise the taking would be confiscation; and that the object must be public, for, if merely private, it would be in effect the mere transfer of the property of one person to another, which is not a legislative function.²

The right of eminent domain, being an essential attribute of sovereignty, exists even when not expressly conferred by the State Constitution;³ and its continued exercise being necessary to the existence and well-being of the State, it cannot in the opinion of jurists be surrendered by a legislative act.⁴

The power exists in territorial governments which are invested with general legislative power.⁵ It belongs to the national government, and may be exercised by it within the States to the

¹ *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 61; *Beekman v. Saratoga & S. R. Co.*, 3 Paige, 45, 72, 73; *Heyward v. New York*, 7 N.Y. 314, 324; *Rensselaer & S. R. Co. v. Davis*, 43 N.Y. 137; *West River Bridge Co. v. Dix*, 6 How. 507, 532, 533, 539; *Kohl v. United States*, 91 U. S. 367, 372; *Boom Co. v. Patterson*, 98 U. S. 403, 406; *People v. Humphrey*, 23 Mich. 471; *Gilmer v. Lime Point*, 18 Cal. 229, 250; 2 Kent Com. 339.

² *Beekman v. Saratoga & S. R. Co.*, 3 Paige, 45; *Varick v. Smith*, 5 Paige, 137; *Embury v. Conner*, 3 N. Y. 511; *Buffalo & N. Y. R. Co. v. Brainard*, 9 N. Y. 100, 108; *People v. Smith*, 21 N. Y. 595; *Bloomfield & R. Nat. Gas Light Co. v. Richardson*, 63 Barb. 437; *Giesy v. Cincinnati*,

W., & Z. R. Co., 4 Ohio St. 308, 326; *Reeves v. Wood County*, 8 Ohio St. 333; *Talbot v. Hudson*, 16 Gray, 417; *Coster v. Tide Water Co.*, 3 C. E. Green, 54; *New Central Coal Co. v. George's Creek Coal & I. Co.*, 37 Md. 537, 559; *Nesbitt v. Trumbo*, 39 Ill. 110; *Bankhead v. Brown*, 25 Iowa, 540; *Edgewood R. Co.'s Appeal*, 79 Pa. St. 257; *Newby v. Platte County*, 25 Mo. 259.

³ *Brown v. Beatty*, 84 Miss. 227; *Boom Co. v. Patterson*, 98 U. S. 403; *Harvey v. Thomas*, 10 Watts, 63.

⁴ *Piscataqua Bridge v. New Hamp. Bridge*, 7 N. H. 35, 69; *Backus v. Lebanon*, 11 N. H. 19, 24.

⁵ *Swan v. Williams*, 2 Mich. 427; *Warren v. St. Paul & P. R. Co.*, 18 Minn. 384.

extent necessary for executing the powers conferred upon it by the Constitution.¹ The exercise of the power by the States in its behalf has sometimes been justified;² but the better opinion is that each sovereignty can constitutionally act only for itself, and use the power only for its own purposes.³ The exercise of the power by the States cannot be controlled by the United States.⁴

A Public Use.—The right of eminent domain may be resorted to for a public use; that is, for an object which concerns the public interest, convenience, or safety. Its exercise, when reasonably required by the public exigencies or convenience, is within the discretion of the legislature. It has been used for the purposes of public roads, turnpikes, canals, ferries, bridges, telegraphs, parks, mill-sites, for the draining of marshes, and bringing water and gas into cities and villages. Railroads have uniformly been regarded as public improvements, for which the State is justified in calling into exercise the sovereign right of eminent domain; and they are still of that character, although operated by private corporations, which exclusively collect and enjoy the tolls for persons and merchandise carried upon them.⁵

To make the use a public one, neither the whole nor a considerable part of the public need have a direct interest in it. The immediate pecuniary benefit may appear to inure to the advantage of comparatively few people, and yet the use be in its nature public.⁶ On this principle, railroads connecting private mines with lines of traffic, and solely or chiefly useful for that purpose, have been held to be a public use;⁷ and it has been

¹ *Kohl v. United States*, 91 U. S. 367; *Darlington v. United States*, 82 Pa. St. 382.

² *Reddall v. Bryan*, 14 Md. 444; *Gilmer v. Lime Point*, 18 Cal. 229; *Burt v. Merchants' Ins. Co.*, 106 Mass. 356; *Orr v. Quimby*, 54 N. H. 590.

³ *People v. Humphrey*, 23 Mich. 471; *Kohl v. United States*, 91 U. S. 367; *Darlington v. United States*, 82 Pa. St. 382.

⁴ *Boom Co. v. Patterson*, 98 U. S. 403.

⁵ *Beekman v. Saratoga & S. R. Co.*, 8 Paige, 45; *Varick v. Smith*, 5 Paige, 137; *Townsend's Case*, 39 N. Y. 171; *New York & H. R. Co. v. Kip*, 46 N. Y. 546; *West River Bridge Co. v. Dix*, 6

How. 507, 537; *Bellona Company's Case*, 3 Bland Ch. 442; *Secombe v. Milwaukie & St. P. R. Co.*, 23 Wall. 108; *Giesy v. Cincinnati, W., & Z. R. Co.*, 4 Ohio St. 308, 326; *Holt v. Somerville*, 127 Mass. 408; *Swan v. Williams*, 2 Mich. 427; *People v. Salem*, 20 Mich. 452; *Brown v. Beatty*, 34 Miss. 227; *Walther v. Warner*, 25 Mo. 277; *Newby v. Platte County*, 25 Mo. 258; *San Francisco, A., & S. R. Co. v. Caldwell*, 31 Cal. 367; *Buffalo Bayou, B., & C. R. Co. v. Ferris*, 26 Texas, 588.

⁶ *Talbot v. Hudson*, 16 Gray, 417, 425; *Denham v. County Com'rs*, 108 Mass. 202; *Gilmer v. Lime Point*, 18 Cal. 229.

⁷ *Harvey v. Thomas*, 10 Watts, 63;

deemed a legitimate exercise of the power to condemn land for tracks connecting a company's railroad with an elevator or abattoir used in its business.¹ It cannot, however, be resorted to for a railroad or other way which is purely private in its character.² The power may be conferred by a general law creating corporations with the right to construct railroads lying wholly within a single city or town.³ The State may intervene by a proper proceeding against a corporation to enjoin its abuse of the power of eminent domain in taking property for a private use;⁴ and equity will restrain such abuse at the suit of individuals who suffer thereby special injury.⁵

Delegation of the Power. — The State may delegate the power of eminent domain. The uses for which the power is invoked, rather than the instruments employed in its exercise, are the test of its existence. A railroad corporation is under a legal obligation to serve the public for a reasonable and uniform toll, and cannot refuse one and accommodate another at its pleasure. In view of its purposes and obligations, the power of eminent domain may be exercised by the State to provide it with a right of way.⁶ The State may confer the power of eminent domain on an individual as well as a corporation;⁷ and on a foreign as well as a

Hays v. Risher, 32 Pa. St. 169; Bankhead v. Brown, 25 Iowa, 540; Contra Costa R. Co. v. Moss, 28 Cal. 323; New Central Coal Co. v. George's Creek Coal & I. Co., 37 Md. 537.

¹ New York Cent. & H. R. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326, 5 Hun, 201, 6 Hun, 149.

² McCandless's Appeal, 70 Pa. St. 210; Edgewood R. Co.'s Appeal, 79 Pa. St. 257; Waddell's Appeal, 84 Pa. St. 90; Central R. Co. v. Penn. R. Co., 4 Stewart (N. J.), 475, 494, 5 Stewart (N. J.), 755; Memphis Freight Co. v. Memphis, 4 Cold. 419; Salt Co. v. Brown, 7 W. Va. 191. See article on "The Constitutionality of Private Ways," 6 Am. Law Rev. 197.

³ Long Branch Com'rs v. West End R. Co., 2 Stewart (N. J.), 566; National Docks R. Co. v. Central R. Co., 5 Stewart (N. J.), 755, 4 Stewart (N. J.), 475.

⁴ People v. Pittsburg R. Co., 53 Cal. 694.

⁵ Edgewood R. Co.'s Appeal, 79 Pa. St. 257; Central R. Co. v. Penn. R. Co.,

4 Stewart (N. J.), 475, 494, 5 Stewart (N. J.), 755.

⁶ Beekman v. Saratoga & S. R. Co., 3 Paige, 45; Bloodgood v. Mohawk & H. R. Co., 14 Wend. 51, 18 Wend. 9; Parmelee v. Oswego & S. R. Co., 7 Barb. 599, 625; Kerr's Case, 42 Barb. 119; Rensselaer & S. R. Co. v. Davis, 43 N. Y. 137; New York & H. R. Co. v. Kip, 46 N. Y. 546; City of Buffalo, *In re*, 68 N. Y. 167; Bloomfield & R. Nat. Gas Light Co. v. Richardson, 63 Barb. 437; Raleigh & G. R. Co. v. Davis, 2 Dev. & Bat. 451; Enfield Toll Bridge Co. v. Hartford & N. H. R. Co., 17 Conn. 40; Bonaparte v. Camden & A. R. Co., Baldwin, 205; Swan v. Williams, 2 Mich. 427; Giesy v. Cincinnati, W., & Z. R. R. Co., 4 Ohio St. 308; Kramer v. Cleveland & P. R. Co., 5 Ohio St. 40; Concord R. Co. v. Greely, 17 N. H. 47; Ash v. Cummings, 50 N. H. 591; Weir v. St. Paul, S., & T. F. R. Co., 18 Minn. 155; Whiteman v. Wilmington & S. R. Co., 2 Harring. (Del.) 514.

⁷ Ash v. Cummings, 50 N. H. 591.

domestic corporation;¹ but a power conferred in terms on domestic corporations does not extend by implication to foreign corporations.² A *de facto* corporation may be clothed with the power; and in proceedings for condemnation the regularity of its organization cannot be questioned,³ provided there is a conformity to law sufficient to create and maintain corporate existence.⁴ The power, when conferred on a corporation, ceases with the termination of corporate existence, and with the expiration of the period limited for the taking of land.⁵ It is conferred as a personal trust and confidence, and cannot be delegated or assigned. It cannot, therefore, when conferred on a railroad corporation, be exercised, without express statute provision, by a lessee of the railroad, or by a person employed to build it.⁶ When conferred on a corporation, the action of the directors in exercising it is ordinarily deemed corporate action.⁷

The delegated power to take private property for public uses is in derogation of common right, and exists only when conferred by statute, and to the extent it is so conferred. Statutes granting it, while they are to be construed reasonably, so as to effect the evident purpose of the legislature, are not to be extended by inference and implication beyond the fair import of the terms expressed. The power is presumed to exist only when required by the public necessity; but such necessity need not be controlling in the particular instance.⁸

¹ *Townsend's Case*, 39 N. Y. 171, 24 Barb. 658; *Black v. Delaware & R. Canal Co.*, 7 C. E. Green, 130, 418, 9 C. E. Green, 455; *New York & E. R. Co. v. Young*, 33 Pa. St. 175; *Gilmer v. Lime Point*, 18 Cal. 229, 251; *Southwestern R. Co. v. Southern & A. Tel. Co.*, 46 Ga. 43; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65.

² *Holbert v. St. Louis, K., C., & N. R. Co.*, 45 Iowa, 23.

³ *Cincinnati, L., & C. R. Co. v. Danville & V. R. Co.*, 75 Ill. 113; *McAuley v. Columbens, C., & I. C. R. Co.*, 83 Ill. 348; *National Docks R. Co. v. Central R. Co.*, 5 Stewart (N. J.), 755, 4 Stewart (N. J.), 475; *Oregon Cascade Co. v. Baily*, 3 Oreg. 64.

⁴ *Atlantic & O. R. Co. v. Sullivant*, 5 Ohio St. 276; *Atkinson v. Marietta & C. R. Co.*, 15 Ohio St. 21; *Powers v. Hazelton & L. R. Co.*, 33 Ohio St. 429. See *ante*, Chap. I. pp. 6, 11.

⁵ *Brooklyn, W., & N. R. Co., In re*, 72 N. Y. 245, 75 N. Y. 335, 19 Hun, 314; *Peavey v. Calais R. Co.*, 30 Me. 498; *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228, 250, 3 Mo. App. 315; *Morris & E. R. Co. v. Central R. Co.*, 2 Vroom, 205, 210.

⁶ *Worcester v. Norwich & W. R. Co.*, 109 Mass. 103; *St. Peter v. Denison*, 58 N. Y. 416.

⁷ *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125.

⁸ *Adams v. Saratoga & W. R. Co.*, 10 N. Y. 328; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137, 146; *New York & H. R. Co. v. Kip*, 46 N. Y. 546; *New York & C. R. Co. v. Gunnison*, 3 Thomp. & C. 632; *Currier v. Marietta & C. R. Co.*, 11 Ohio St. 228; *Miami Coal Co. v. Wigton*, 19 Ohio St. 560; *Curran v. Shattuck*, 24 Cal. 427; *Thacher v. Dartmouth Bridge Co.*, 18 Pick. 501; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1, 36, 37;

What is a Public Use, a Judicial Question. — Whether a use is a public one, for which private property may be taken, is a judicial question; and it is for the judicial department to determine whether a use for which the legislature has assumed to authorize its appropriation is of a public nature. If the use itself is found to be only private, or, further, if the use being public, the appropriation can in no respect be subservient thereto, it is the duty of the judicial department to protect the citizen by proper remedies from the taking of his property, whether attempted in open disregard, or under color, of law. But otherwise than in determining whether the use is public, and whether just compensation has been made or provided for by an adequate remedy, the power of eminent domain is a political power vested in the legislative department, and, in the absence of constitutional restrictions, is to be exercised in its discretion, on such occasions and by such methods as it may see fit.¹

Legislative Discretion as to the Exercise of the Power for a Public Use. — The power to decide whether there is a necessity, emergency, or exigency (which are in this connection equivalent and interchangeable terms), justifying a particular enterprise of a class which is judicially found to be a public use, is, in the absence of a constitutional provision to the contrary, solely a legislative function;² and the legislative discretion is, in this respect, of that plenary character that not only it cannot be

Glover v. Boston, 14 Gray, 282; *Wilson v. Lynn*, 119 Mass. 174; *Prather v. Jeffersonville, M., & I. R. Co.*, 52 Ind. 16, 30. But see *Leisse v. St. Louis & I. M. R. Co.*, 3 Mo. App. 105.

¹ *Buffalo & N. Y. R. Co. v. Brainard*, 9 N. Y. 100, 108; *People v. Smith*, 21 N. Y. 595; *Townsend's Case*, 39 N. Y. 171; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *Deanville Cemetery Assoc., In re*, 66 N. Y. 569, 5 Hun, 482; *Bloomfield & R. Nat. Gas L. Co. v. Richardson*, 63 Barb. 437; *Talbot v. Hudson*, 16 Gray, 417; *Haverhill Bridge Proprietors v. County Com'rs*, 103 Mass. 120; *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125; *Brayton v. Fall River*, 124 Mass. 95; *Holt v. Somerville*, 127 Mass. 408; *Tyler v. Beacher*, 44 Vt. 648; *Coster v. Tide Water Co.*, 3 C. E. Green, 54; *Central R. Co. v. Penn. R. Co.*, 4 Stewart (N. J.),

475, 487, 5 Stewart (N. J.), 755; *New Central Coal Co. v. George's Creek Coal & I. Co.*, 37 Md. 537, 560; *Giesey v. Cincinnati, W., & Z. R. Co.*, 4 Ohio St. 308, 325; *Gilmer v. Lime Point*, 18 Cal. 229; *Contra Costa R. Co. v. Moss*, 23 Cal. 323; *Bankhead v. Brown*, 25 Iowa, 540; *Johnson v. Joliet & C. R. Co.*, 23 Ill. 202; *Chicago, R., I., & P. R. Co. v. Lake*, 71 Ill. 333; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Dietrich v. Murdoch*, 42 Mo. 279; *Concord R. Co. v. Greely*, 17 N. H. 47; *Mount Washington Road, In re*, 35 N. H. 134; *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609; *Boom Co. v. Patterson*, 98 U. S. 403; *Whiteman v. Wilmington & S. R. Co.*, 2 Harring. 514.

² *Supra*, note 1. In some States the Constitution requires a jury to determine the necessity. *Paul v. Detroit*, 32 Mich. 108.

revised by the judiciary, but citizens whose property is taken are not entitled to have notice and be heard as to the expediency of the appropriation.¹ The legislative discretion comprehends the amount of property required for the public use;² the duration of the power;³ the extent of the estate to be taken, whether an easement or the fee;⁴ the choice of methods and proceedings in taking the property, in determining the necessity of the taking, and in preventing a perversion of the property taken from its legitimate use.⁵

The legislature may itself declare specifically the property to be taken for a public use, or it may confer the power on some impartial public body or tribunal, or even on the person or corporation in which the title is to be vested by the proceedings. In the case of railroads, it may, by a special act creating a corporation, describe fully the location, or appoint only the termini and principal points, leaving the selection of the precise location to the choice of the corporation.⁶ It may by general law confer such powers on corporations to be created as well as on those already existing; and even authorize corporations, thereafter to be created by individuals after certain proceedings, to build rail-

¹ *People v. Smith*, 21 N. Y. 595; *St. Paul & P. R. Co.*, 16 Minn. 271; *Weir v. St. Paul, S., & T. F. R. Co.*, 18 Minn. 155; *Lehmicke v. St. Paul, S., & T. F. R. Co.*, 19 Minn. 464. See *North Mo. R. Co. v. Lackland*, 25 Mo. 515.

² *Hingham & Q. Bridge & T. Co. v. Norfolk County*, 6 Allen, 353.

³ *Toledo & W. R. Co. v. Daniels*, 16 Ohio St. 390; *Phil., W., & B. R. Co. v. Williams*, 54 Pa. St. 103.

⁴ *Water Works Co. v. Burkhart*, 41 Ind. 364; *De Varaigne v. Fox*, 2 Blatch. 95; *Heyward v. New York*, 7 N. Y. 314; *Rexford v. Knight*, 11 N. Y. 308; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 3 Lansing, 429; *Heard v. Brooklyn*, 60 N. Y. 242; *Chase v. Sutton Man. Co.*, 4 Cush. 152; *Dingley v. Boston*, 100 Mass. 544; *Malone v. Toledo*, 34 Ohio St. 541, 28 Ohio St. 643; *Raleigh & G. R. Co. v. Davis*, 2 Dev. & B. 451, 467. This discretion may be vested in the corporation. *Charlestown & S. R. Co. v. Blake*, 12 Rich. 634.

⁵ *Townsend's Case*, 39 N. Y. 171, 24 Barb. 658; *Secombe v. Mil. & St. P. R. Co.*, 23 Wall. 108; *Kramer v. Cleveland & P. R. Co.*, 5 Ohio St. 140; *Wilkin v.*

Boston Water Power Co. v. Boston & W. R. Co., 23 Pick. 360; *Haverhill Bridge Proprietors v. County Com'rs*, 103 Mass. 120; *White River Turnp. Co. v. Vt. Cent. R. Co.*, 21 Vt. 590; *Buffalo & N. Y. R. Co. v. Brainard*, 9 N. Y. 100; *People v. Smith*, 21 N. Y. 595; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *New York Elevated R. Co., In re*, 70 N. Y. 327; *Gilbert Elevated R. Co., In re*, 70 N. Y. 361, 9 Hun, 303; *Iron R. Co. v. Ironton*, 19 Ohio St. 299; *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609; *Weir v. St. Paul, S., & T. F. R. Co.*, 18 Minn. 155; *Warren v. St. Paul & P. R. Co.*, 18 Minn. 384; *Chicago, R. I., & P. R. Co. v. Lake*, 71 Ill. 333; *Commonwealth v. Franklin Canal Co.*, 21 Pa. St. 117; *New York & E. R. Co. v. Young*, 33 Pa. St. 175; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325; *Parke's Appeal*, 64 Pa. St. 137; *Stockton & D. R. Co. v. Brown*, 9 H. L. C. 246.

roads on any routes selected by them, and to take private property therefor. It is assumed, where such large discretion in constructing and maintaining a railroad is confided to the corporation, that the pecuniary interest of parties who invest their capital will be identical with the public interest. It is customary, however, to control that discretion both as to the route, and even the enterprise itself, through the intervention of a judicial tribunal or some administrative board; but the extent of such control, where just compensation is made, is purely a matter of legislative choice.¹

In New York, the power to determine the necessity and extent of the appropriation is vested by statute in the court, and the land-owner may contest the question upon an application of the company for the taking of land. The burden of proof is on the company to show the necessity.²

If the legislature itself declares specifically the property required for a conceded public use, such declaration of the public necessity is conclusive on the judicial department, at least unless the property so declared cannot in any way serve the use in question, and the legislative act appears to be a mere attempt, under color of law, to transfer the property of one citizen to another.³ But more often the legislature refrains from a description of the property, and delegates a power of selection to the corporation, subject in some cases to the approval of a tribunal of some sort; and when this course is taken, questions are likely to arise as to what property is required for the railroad or public use.

Occasions for Use of the Power; the Necessity or Exigency requiring its Exercise.—The necessity or exigency, which justifies the exercise of the power of eminent domain, relates rather to the nature of the property and the uses to which it is to be applied, than to the circumstances of the particular case. Thus, where the corporation, in the exercise of discretion conferred by statute, has selected land adapted to its purposes, it is not a valid objection to its appropriation, where no wanton motive

¹ *Buffalo & N. Y. R. Co. v. Brainard*, 9 N. Y. 100; *Weir v. St. Paul, S., & T. F. R. Co.*, 18 Minn. 155; *Warren v. St. Paul & P. R. Co.*, 18 Minn. 384; *National Docks R. Co. v. Central R. Co.*, 5 Stewart (N. J.), 755, 4 Stewart (N. J.), 475.

² *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *New York Cent. R. Co., In re*, 66 N. Y. 407.

³ *Talbot v. Hudson*, 16 Gray, 417, 424; *Giesy v. Cincinnati, W., & Z. R. Co.*, 4 Ohio St. 308, 325.

appears, or great mischief is likely to ensue, that other land in the vicinity, which could have been obtained by purchase, would serve its purposes as well,¹ or that it is already holding under a lease the estate which it seeks to take.² The discretion of the corporation in the choice of land to be taken, when conferred by statute, is not subject to judicial revision, where the purpose for which it is taken is lawful, and no bad faith on the part of the corporation appears.³

Equity has interposed, at the suit of land-owners, to prevent an abuse of the power, where the corporation was authorized to take property without resort to a judicial or other public authority;⁴ but the extent of the power has been defined mostly in cases where the corporation has filed, under statutes, a petition for the condemnation of property. The power has been limited to a reasonable necessity, to the exclusion of subsidiary and extraordinary purposes. Thus, it has been held to be properly used to acquire land for a right of way, station grounds, station-houses for passengers, and approaches thereto, engine-houses, and ware-houses for receiving, storing, and delivering goods,⁵ cattle-yards

¹ *New York & H. R. Co. v. Kip*, 46 N. Y. 546; *Giesy v. Cincinnati, W., & Z. R. Co.*, 4 Ohio St. 308; *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609. See *Prather v. Jeffersonville, M., & I. R. Co.*, 52 Ind. 16, 37.

² *New York & H. R. Co. v. Kip*, 46 N. Y. 546, 67 N. Y. 227. It was held in *New Central Coal Co. v. George's Creek Coal & I. Co.*, 37 Md. 537, 563, that a corporation could not take land for a right of way where it is already the owner of land equally useful for its purposes.

³ *Eldridge v. Smith*, 34 Vt. 484; *Lodge v. Phil., W., & B. R. Co.*, 8 Phil. 345.

⁴ *Eversfield v. Mid-Sussex R. Co.*, 1 Giffard Ch. 153, 3 De Gex & J. 286; *Dodd v. Salisbury & Y. R. Co.*, 1 Giffard Ch. 158, 5 Jur. n. s. 782, 33 L. T. 311; *Webb v. Manchester & L. R. Co.*, 4 Mylne & C. 116; *Flower v. London, B., & S. C. R. Co.*, 2 Drewry & S. 330. Whether the saving of expense justifies the taking of a particular piece of land, see *Dodd v. Salisbury & Y. R. Co.*, *supra*. As to the recovery of "superfluous land" by the owner under English Statutes, 1845, 8 & 9 Vict. c. 18, §§ 127, 128, see *Great Western R. Co.*

v. May, L. R. 7 H. L. 283, L. R. 8 Q. B. 26, L. R. 7 Q. B. 364; *London & S. W. R. Co. v. Blackmore*, L. R. 4 H. L. 610; *Betts v. Great Eastern R. Co.*, L. R. 8 Exch. 294, L. R. 3 Exch. Div. 182; *Hooper v. Bourne*, L. R. 3 Q. B. Div. 258,* L. R. 5 App. Cas. 1; *Mulliner v. Midland R. Co.*, L. R. 11 Ch. Div. 611; *Best v. Hamand*, L. R. 12 Ch. Div. 1; *Norton v. London & N. W. R. Co.*, L. R. 13 Ch. Div. 268, 9 Ch. Div. 623.

⁵ *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *New York & H. R. Co. v. Kip*, 46 N. Y. 546, 67 N. Y. 227, 6 Hun. 24; *New York Cent. & H. R. R. Co.*, *In re*, 77 N. Y. 248; *Mansfield, C., & L. M. R. Co. v. Clark*, 23 Mich. 519; *Reed v. Louisville Bridge Co.*, 8 Bush, 69; *Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. 553; *Giesy v. Cincinnati, W., & Z. R. Co.*, 4 Ohio St. 308; *Weir v. St. Paul, S., & T. F. R. Co.*, 18 Minn. 155, 167; *Nashville & C. R. Co. v. Cowardin*, 11 Humph. 348; *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467; *South Carolina R. Co. v. Blake*, 9 Rich. 228; *Hannibal & St. J. R. Co. v. Muder*, 49 Mo. 165. See *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 23; *post*, Chap. XVIII., TAXATION.

for stock transported on the railroad,¹ shops for the repair of cars and locomotives,² turnouts and side-tracks,³ springs to supply its tanks,⁴ land for the deposit of waste earth,⁵ additional tracks on the entire route,⁶ and a location wide enough to admit a telegraph line for its use.⁷

The power cannot be used to acquire property for the purpose of speculation or sale, preventing competition, aiding collateral enterprises remotely connected with the management of the railroad, or facilitating prospective business which cannot reasonably be expected;⁸ and it has been deemed essential that the land to be condemned should be such as ought, from necessity and usage, to be contiguous to the railroad. Thus, it has been held that the corporation cannot take land for the dwellings of operatives,⁹ or the manufacture of railway carriages,¹⁰ or for procuring gravel for the construction of the road,¹¹ or for a wharf,¹² or for a temporary right of way during the construction of its main track.¹³ In determining the amount to be taken, reference may be had, to a reasonable extent, to the prospective wants of the company, and its necessity and convenience in the forwarding and transshipment of merchandise.¹⁴

The power to take property may be limited to the original construction of the road, or it may, where such appears to be the

¹ New York Cent. R. Co., *In re*, 63 N. Y. 326.

² Chicago, B., & Q. R. Co. v. Wilson, 17 Ill. 123; Low v. Galena & C. U. R. Co., 18 Ill. 324; Hannibal & St. J. R. Co. v. Muder, 49 Mo. 165; Virginia & T. R. Co. v. Elliott, 5 Nev. 358; State v. Mansfield, 3 Zab. 510. See Southern Pacific R. Co. v. Raymond, 53 Cal. 223.

³ Toledo & W. R. Co. v. Daniels, 16 Ohio St. 390; Philadelphia, W., & B. R. Co. v. Williams, 54 Pa. St. 103; Cleveland & P. R. Co. v. Speer, 56 Pa. St. 325.

⁴ Strohecker v. Alabama & C. R. Co., 42 Ga. 509.

⁵ Lodge v. Phil., W., & B. R. Co., 8 Phil. 345.

⁶ New York Central R. Co., *In re*, 67 Barb. 426.

⁷ Prather v. Jeffersonville, M., & I. R. Co., 52 Ind. 16. The power to take land for lateral roads is not to be implied, Baltimore & H. Turnp. Co. v. Union R. Co., 35 Md. 224.

⁸ Rensselaer & S. R. Co. v. Davis, 43 N. Y. 137.

⁹ Rensselaer & S. R. Co., v. Davis, 43 N. Y. 137; State v. Mansfield, 3 Zab. 510; Nashville & C. R. Co. v. Cowardin, 11 Humph. 348; Eldridge v. Smith, 34 Vt. 484.

¹⁰ Eldridge v. Smith, 34 Vt. 484; New York & E. H. R. Co. v. Kip, 46 N. Y. 546, 6 Hun, 24.

¹¹ New York & C. R. Co. v. Gunnison. 1 Hun, 496, 3 Thomp. & C. 632.

¹² Iron R. Co. v. Ironton, 19 Ohio St. 299.

¹³ Currier v. Marietta & C. R. Co., 11 Ohio St. 228. Lands held for a canal basin, where the railroad has no canal connection, is not protected from levy and execution. Plymouth R. Co. v. Colwell, 39 Pa. St. 337.

¹⁴ New York Cent. & H. R. R. Co., *In re*, 77 N. Y. 248; Lodge v. Phil., W., & B. R. Co., 8 Phil. 345.

intent of the statute, authorize appropriations from time to time to supply the demands of increased business.¹

Property Subject to the Right of Eminent Domain. — As a general rule, all property is subject to this right, irrespective of the use to which it has already been applied, or the different estates and interests held in it. The following, like other property, are subject to condemnation: Incorporeal hereditaments, as rights of way;² the right to a flow of water;³ the easement of one corporation within the location of another;⁴ leasehold estates;⁵ land subject to a lease or mortgage,⁶ or to a judgment lien,⁷ or owned by parties under disability;⁸ land used as the site of wharves,⁹ or of dwelling-houses;¹⁰ land under water;¹¹ land already occupied by the corporation under a lease,¹² or under a defective title,¹³ or without color of right;¹⁴ a subterranean right of way;¹⁵ land owned by the State itself;¹⁶ the public lands of the United States not already appropriated to specific national uses.¹⁷

¹ Chicago, B., & Q. R. Co. v. Wilson, 17 Ill. 123; Toledo & W. R. Co. v. Daniels, 16 Ohio St. 390; South Carolina R. Co. v. Blake, 9 Rich. 228; Philadelphia, W., & B. R. Co. v. Williams, 54 Pa. St. 103; New York Cent. R. Co., *In re*, 67 Barb. 426; Prather v. Jeffersonville, M., & I. R. Co., 52 Ind. 16; Beck v. United New Jersey R. & C. Co., 10 Vroom, 45. See *post*, Chap. IX. pp. 255, 256.

² Philadelphia, W., & B. R. Co. v. Williams, 54 Pa. St. 103; Boston Gas Light Co. v. Old Colony & N. R. Co., 14 Allen, 444; Galena & S. W. R. Co. v. Haslam, 73 Ill. 494; Sixth Avenue R. Co. v. Kerr, 72 N. Y. 330.

³ Arnold v. Hudson River R. Co., 55 N. Y. 661, 49 Barb. 108.

⁴ Cincinnati & I. R. Co. v. Zinn, 18 Ohio St. 417.

⁵ Cobb v. Boston, 109 Mass. 438.

⁶ New York Cent. R. Co., *In re*, 20 Barb. 419; North Penn. R. Co. v. Davis, 26 Pa. St. 238; Alabama & F. R. Co. v. Kenney, 39 Ala. 307; Kip v. New York & H. R. Co., 67 N. Y. 227, 46 N. Y. 546, 6 Hun, 24.

⁷ Watson v. New York Cent. R. Co., 47 N. Y. 157.

⁸ East Tenn. & V. R. Co. v. Love, 3 Head, 63.

⁹ Boston & W. R. Co. v. Old Colony

R. Co., 12 Cush. 605, 3 Allen, 142; Iron R. Co. v. Ironton, 19 Ohio St. 299; New York Cent. & H. R. R. Co., *In re*, 77 N. Y. 248.

¹⁰ Bocket v. Ohio & P. R. Co., 14 Pa. St. 241; Cleveland & P. R. Co. v. Speer, 56 Pa. St. 325; Wells v. Somerset & K. R. Co., 47 Me. 345.

¹¹ New York Cent. & H. R. R. Co., *In re*, 77 N. Y. 248.

¹² Kip v. New York & H. R. Co., 67 N. Y. 227.

¹³ Prospect Park & C. I. R. Co., *In re*, 67 N. Y. 371, 8 Hun, 30.

¹⁴ Secombe v. Mil. & St. P. R. Co., 23 Wall. 108; McClinton v. Pittsburgh, Ft. W., & C. R. Co., 66 Pa. St. 404.

¹⁵ Brown v. Corey, 43 Pa. St. 495; Baltimore & P. R. Co. v. Reaney, 42 Md. 117.

¹⁶ Indiana Cent. R. Co. v. State, 3 Ind. 421. The right to take the land of the State, under navigable waters, was held not to be given in Stevens v. Paterson & N. R. Co., 5 C. E. Green, 126; Attorney-General v. Hudson Tunnel Co., 12 C. E. Green, 176.

¹⁷ United States v. Railroad Bridge Co., 6 McLean, 517; Grintner v. Kansas Pacific R. Co., 23 Kan. 642; Illinois Cent. R. Co. v. United States (Court of Claims), 20 Law Reporter, 630; Union Pacific R.

Property of Corporations.—The property of a corporation is, like that of an individual, subject to condemnation for a public use. If not held for a public use, it is equally liable with similar property of individuals to be taken under the right of eminent domain.¹ But even if so held for a public use, that is, being property acquired or subject to acquisition under the right of eminent domain, it may be taken for another public use; and it is immaterial if the new public use to which it is appropriated be one of a similar character. Thus, upon compensation being made, the locations of highways, turnpikes, and canals may be taken for those of railroads,² and the location of a railroad, owned by one corporation, may be taken for the use of another,³ or for a highway;⁴ and it is for the legislature to determine, upon a view of the public necessity and convenience, which of these uses shall yield to the other.⁵ One railroad company may be authorized, upon making compensation, to cross and use the tracks of another company,⁶ or to take the latter's interest in a public highway.⁷ A State may authorize such interferences with the location of a railroad company which derives its fran-

Co. v. Burlington & M. R. R. Co. (U. S. C. C., D. Neb.), 3 Fed. Rep. 106, 13 Chicago Leg. News, 17, 10 Reporter, 357; *United States v. Chicago*, 7 How. 185, 189. But not against the paramount title of the United States. *Doran v. Central Pacific R. Co.*, 24 Cal. 245.

¹ *New York, C., & H. R. R. Co. v. Metropolitan Gas Light Co.*, 63 N. Y. 326, 5 Hun, 201, 6 Hun, 149; *Rochester Water Com'rs, In re*, 66 N. Y. 413; *Peoria, P., & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174; *Iron R. Co. v. Ironton*, 19 Ohio St. 299; *Alabama & F. R. Co. v. Kenney*, 39 Ala. 307.

² *Boston Water Power Co. v. Boston & W. R. Co.*, 23 Pick. 360; *White River Turnp. Co. v. Vt. Cent. R. Co.*, 21 Vt. 590; *Lafayette Plank Road Co. v. New Albany & S. R. Co.*, 13 Ind. 90.

³ *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125; *Sixth Avenue R. Co. v. Kerr*, 72 N. Y. 330; *Oakland R. Co. v. Oakland, B., & F. V. R. Co.*, 45 Cal. 365, 376; *Oregon Cascade R. Co. v. Baily*, 8 Oreg. 164; *Northern R. Co. v. Concord & C. R. Co.*, 27 N. H. 183; *Commonwealth v. Dickinson*, 9 Phil. 561.

⁴ *Old Colony & F. R. R. Co. v. Plymouth Co.*, 14 Gray, 155; *Little Miami & C. & X. R. Cos. v. Dayton*, 23 Ohio St. 510; *Iron R. Co. v. Ironton*, 19 Ohio St. 299; *Chicago, R. I., & P. R. Co. v. Lake*, 71 Ill. 333; *Phil. & R. R. Co. v. Philadelphia*, 47 Pa. St. 325.

⁵ *Commonwealth v. Essex Co.*, 13 Gray, 239, 247; *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125, 131.

⁶ *Morris & E. R. Co. v. Central R. Co.*, 2 Vroom, 205; *State v. Easton & A. R. Co.*, 7 Vroom, 181; *Grand Junction R. & D. Co. v. County Com'rs*, 14 Gray, 553; *Mass. Cent. R. Co. v. Boston, C., & F. R. Co.*, 121 Mass. 124; *Newcastle & R. R. Co. v. Peru & I. R. Co.*, 3 Ind. 464; *Lake Shore & M. S. R. Co. v. Cincinnati, S., & C. R. Co.*, 30 Ohio St. 604; *Kerr's Case*, 42 Barb. 119; *Sixth Avenue R. Co. v. Kerr*, 45 Barb. 138; *Baltimore & H. Turnp. Co. v. Union R. Co.*, 35 Md. 224. In some States, compensation for the mere right to cross a track is not required. *Post*, p.

⁷ *Metropolitan City R. Co. v. Chicago W. D. R. Co.*, 87 Ill. 317.

chise from the United States.¹ But the right to take property already appropriated to a public use, to the extent of destroying or greatly injuring such use, ought clearly to appear.²

Franchises.—The franchise of the corporation derived from a grant by the State, as well as its other property, is subject to be condemned for the purposes of a railroad company. It is an incorporeal hereditament, and, as well as easements, or any kind of real or personal estate, may be taken for a public use. The State, in the exercise of the right of eminent domain, may impair its value, or even extinguish it, upon compensation being made. The taking of the franchise does not impair the obligation of the contract implied in the grant, but is the exercise of an independent power, acting not on the contract, but on the property acquired thereby.³

Exclusive Grants.—Franchises under which exclusive rights are granted are, like other franchises, subject to the right of eminent domain. The legislature may, unless restrained by the State Constitution, grant franchises more or less extensive; and may, with a view of inspiring confidence in the undertaking, stipulate in the grant that no other like enterprise shall for a limited time, or indefinitely, be authorized within a certain distance from the line of the one authorized thereby. Such a grant is a contract, within the meaning of the national Constitution. The grant itself is irrevocable, but the whole franchise, including the exclusive right, remains subject to the right of eminent domain. The

¹ *Union Pacific R. Co. v. Burlington & M. R. R. Co.* (U. S. C. C., D. Neb.), 3 Fed. Rep. 106, 13 Chicago Leg. News, 17, 10 Reporter, 357; *Northern Pacific R. Co. v. St. Paul, M., & M. R. Co.* (U. S. C. C., D. Minn.), 3 Fed. Rep. 702.

² *New York, H., & N. R. Co. v. Boston, H., & E. R. Co.*, 36 Conn. 196; *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125; *Central City Horse R. Co. v. Fort Clark Horse R. Co.*, 81 Ill. 523; *United States v. Chicago*, 7 How. 185, 195.

³ *West River Bridge Co. v. Dix*, 6 How. 507, 534; *Richmond, F., & P. R. Co. v. Louisa R. Co.*, 13 How. 71; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1; *Central Bridge Co. v. Lowell*, 4 Gray, 474, 15 Gray, 106; *Eastern R. Co.*

v. Boston & M. R., 111 Mass. 125; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289; *Backus v. Lebanon*, 11 N. H. 19; *Northern R. Co. v. Concord & C. R. Co.*, 27 N. H. 183; *Crosby v. Hanover*, 36 N. H. 404; *New York, H., & N. R. Co. v. Boston, H., & E. R. Co.*, 36 Conn. 196; *Baltimore & H. Turnp. Co. v. Union R. Co.*, 35 Md. 224; *Kerr's Case*, 42 Barb. 119; *Commonwealth v. Pittsburg & C. R. Co.*, 58 Pa. St. 26, 50; *Commonwealth v. Penn. Canal Co.*, 66 Pa. St. 41, 57; *Towanda Bridge Co., In re* (Penn. S. C.), 87 Leg. Int. 389; *Lafayette Plank Road Co. v. New Albany & S. R. Co.*, 13 Ind. 90; *Metropolitan City R. Co. v. Chicago W. D. R. Co.*, 87 Ill. 317.

legislature may therefore, where a company's charter has provided that no other railroad shall be authorized within a certain distance from its location, authorize another railroad within such distance, upon just compensation being made to the corporation which is thus deprived of the benefit of its exclusive grant.¹

The exclusive right is, however, not to be implied; and the company enjoying a franchise without being protected by an express exclusive grant is without remedy if a railroad company is authorized to construct a road so near to it as essentially to diminish its revenues. This is in accordance with the well-settled principle, that the grant of franchises by the public in matters which concern the public interests is to be construed strictly, and that nothing passes by implication, and no rights are taken from the public or given to the corporation beyond those conveyed by the words of the grant naturally and properly construed.²

The franchise of a corporation can be taken for a public use only, which is real and not merely pretended. As this right may be exercised both for and against a railroad company, it would seem that its franchise could not be condemned for another company, incorporated for precisely the same public use, — as where both companies had the same line and termini, were operated in the same manner, and answered the same public purposes. This would be substantially taking the property of one company and transferring it to another for a mere private purpose, in derogation of the first grant, not justified by the right of eminent domain, and beyond the proper scope of legislative power.³

Presumption against Interference with Earlier Grants for Public Use.

— The grant of a power in general terms to take land for a public use is, however, presumed not to authorize a substantial inter-

¹ *Richmond, F., & P. R. Co. v. Louisa R. Co.*, 13 How. 71; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 454; *Piscataqua Bridge v. New Hamp. Bridge*, 7 N. H. 35; *New Orleans, M., & T. R. Co. v. Southern & A. Tel. Co.*, 53 Ala. 211; *Raritan & D. B. R. Co. v. Delaware & R. C. Co.*, 3 C. E. Green, 546; *New Jersey Southern R. Co. v. Long Branch Com'rs*, 10 Vroom, 28;

Metropolitan City R. Co. v. Chicago W. D. R. Co., 87 Ill. 317.

² See cases cited *ante*, note 1. *Post*, Chap. XVII., **LEGISLATIVE POWER**, p. 452, and Chap. XIX., **CORPORATE POWERS**, p. 493.

³ *Boston Water Power Co. v. Boston & W. R. Co.*, 23 Pick. 360, 393; *Beekman v. Saratoga & S. R. Co.*, 3 Paige, 45; *West River Bridge Co. v. Dix*, 6 How. 507, 537, per M'Lean, J.

ference with a prior grant or an earlier appropriation to another public use.¹ But this principle is not to be applied so as to defeat the subsequent grant, where by fair construction both uses can stand together.² And the power to interfere with, impair, and even destroy the value of the earlier grant, may result from express words, or necessary implication either from the language of the later grant or from its being shown by the application of the terms of the later grant to the subject-matter that the railroad or other way cannot by reasonable intendment be laid in any other manner and on any other line.³ Thus, if a railroad is authorized between certain points, and if necessarily or in the usual and convenient course it will cross highways or other railroads, it may be laid across them, even without any express reference to them in the authority. Such crossing, being necessary to the enjoyment of the second grant, and not essentially impairing the first, is presumed to be authorized. But, on the other hand, the right to take exclusively the location made under the first grant, or any part of it, or to lay tracks longitudinally for a considerable distance upon it, ought to be expressly conferred, or implied only where otherwise effect could not be given to the second grant.⁴

¹ *Packer v. Sunbury & E. R. Co.*, 19 Pa. St. 211; *Penn. R. Co., In re*, 37 Leg. Int. 125; *Chesapeake & O. Canal Co. v. Balt. & O. R. Co.*, 4 Gill & J. 1; *West River Bridge Co. v. Dix*, 6 How. 543; *Commissioners of Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446; *Boston & A. R. Co., In re*, 58 N. Y. 574; *City of Buffalo, In re*, 68 N. Y. 167; *New York Cent. & H. R. Co., In re*, 77 N. Y. 248; *New York & B. B. R. Co., In re*, 20 Hun, 201; *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 92; *State v. Montclair R. Co.*, 6 Vroom, 328.

² *Boston Water Power Co. v. Boston & W. R. Co.*, 23 Pick. 360; *Morris & E. R. Co. v. Newark*, 2 Stock. 352; *Chicago, R. I., & P. R. Co. v. Joliet*, 79 Ill. 25; *Little Miami, C., & X. R. Co. v. Dayton*, 23 Ohio St. 510.

³ *Springfield v. Conn. River R. Co.*, 4 Cush. 63; *White River Turnp. Co. v. Vt. Cent. R. Co.* 21 Vt. 590; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 454; *New York, H., & N. R.*

Co. v. Boston, H., & E. R. Co., 36 Conn. 196; *Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255; *Central City Horse R. Co. v. Ft. Clark Horse R. Co.*, 81 Ill. 523; *Contra Costa R. Co. v. Moss*, 23 Cal. 323; *Rex v. Pease*, 4 B. & Ad. 30.

⁴ *Springfield v. Conn. River R. Co.*, 4 Cush. 63; *Commonwealth v. Old Colony & F. R. R. Co.*, 14 Gray, 93; *Commissioners of Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446; *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391; *Worcester & N. R. v. Railroad Com'rs*, 118 Mass. 561; *Boston & M. R. v. Lowell & L. R. Co.*, 124 Mass. 368; *City of Buffalo, In re*, 68 N. Y. 167, 64 N. Y. 547; *Starr v. Camden & A. R. Co.*, 4 Zab. 592; *Morris & E. R. Co. v. Newark*, 2 Stock. 352, 361; *Morris & E. R. Co. v. Central R. Co.*, 2 Vroom, 205; *Hoboken Land Co. v. Hoboken*, 6 Vroom, 205; *State v. Montclair R. Co.*, 6 Vroom, 328; *National R. Co. v. Eastern & A. R. Co.*, 7 Vroom, 181; *New Jersey Southern R. Co. v. Long Branch Com'rs*,

A general power to take land belonging to the State does not authorize the taking of such as is already applied to a specific public use.¹ A general power to take land does not include land already appropriated to a public park.² This presumption against the taking of property already appropriated to a public use does not extend to land held by a corporation simply as property, and not used for or necessary to a public use;³ and it does not exclude the acquisition of an easement which may be enjoyed without detriment to the prior use.⁴

The presumption not only limits the power of a railroad corporation in taking land already appropriated to a public use, but it protects the location of the railroad from being taken for public highways, unless the taking is clearly authorized by statute. Thus, the power of a city or town to lay highways includes the power to lay them across existing railroads, but not the power to lay them longitudinally upon the location of the railroad, or otherwise to interfere essentially with it.⁵ So, also, a general power to lay out streets will not authorize the laying of them across the station grounds of a company so as to impair its easement.⁶ A general power to take land for a canal does not authorize the taking of land already appropriated to the use of a railroad.⁷ A general power to erect fixtures for a telegraph line upon highways and

10 Vroom, 28; *Attorney-General v. Morris & E. R. Co.*, 4 C. E. Green, 386; *Newark & N. Y. R. Co. v. Newark*, 8 C. E. Green, 515; *Greenwich v. Easton & A. R. Co.*, 9 C. E. Green, 217, 10 C. E. Green, 565; *Long Branch Com'rs v. West End R. Co.*, 2 Stewart (N. J.), 566; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339, 352; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325; *Cake v. Phil. & E. R. Co.*, 87 Pa. St. 307; *Penn. R. Co.*, *In re*, 37 Leg. Int. 125; *Tennessee & A. R. Co. v. Adams*, 3 Head, 596; *Contra Costa R. Co. v. Moss*, 23 Cal. 323; *Oregon Cascade R. Co. v. Baily*, 3 Oreg. 164; *Central City Horse R. Co. v. Ft. Clarke Horse R. Co.*, 81 Ill. 523; *Rex v. Pease*, 4 B. & Ad. 30; *Regina v. Wycombe R. Co.*, L. R. 2 Q. B. 310; *Attorney-General v. Ely, H., & S. R. Co.*, L. R. 4 Ch. App. 194, L. R. 6 Eq. Cas. 106; *Pugh v. Golden Valley R. Co.*, L. R. 12 Ch. Div. 274.

¹ *St. Louis, J., & C. R. Co. v. Trustees*, 43 Ill. 303.

² *Boston & A. R. Co.*, *In re*, 53 N. Y. 575; *New York & B. B. R. Co.*, *In re*, 20 Hun, 201. See *Ninth Avenue*, *In re*, 45 N. Y. 729.

³ *Rochester Water Com'rs*, *In re*, 66 N. Y. 413; *Peoria, P., & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174.

⁴ *Rochester Water Com'rs*, *In re*, 66 N. Y. 413.

⁵ *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345; *City of Buffalo*, *In re*, 68 N. Y. 167, 64 N. Y. 547; *New Jersey Southern R. Co. v. Long Branch Com'rs*, 10 Vroom, 28; *Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255; *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109; *Hannibal v. Hannibal & St. J. R. Co.*, 49 Mo. 480; *Northern Central R. Co. v. Baltimore*, 46 Md. 425; *Atlanta v. Central R. Co.*, 53 Ga. 120.

⁶ *Milwaukee & St. P. R. Co. v. Fairbault*, 23 Minn. 167. 52 N. Y. 570, 24 N. Y.

⁷ *City of Buffalo*, *In re*, 68 N. Y. 167, 64 N. Y. 547.

other land does not authorize their erection within the location of a railroad company.¹

Where the routes selected by two companies, incorporated to construct independent lines, interfere, — the termini only of each being prescribed, and there being no necessary conflict on the face of the charter, or in their objects, — the prior right to particular land attaches to the company which first actually surveys and adopts a route, and files its survey according to law.²

A corporation created under a statute which authorizes individuals to form a railroad corporation and obtain a location by agreement with certain public authorities, cannot take land within the location of other companies.³ The respective rights of parties claiming under earlier and later grants for public uses will be considered in a subsequent chapter.⁴

Estate or Interest taken. — The State may take the fee or a less estate for a public use. It is not less a legislative function to determine what estate in point of duration the public exigency requires to be condemned, than to determine the existence of the public exigency which requires the condemnation of any estate.⁵

Whether the legislative intent is to take the fee or only an easement, depends rather upon the general tenor and purposes of the statute than upon the use or omission of technical terms. The taking of the entire interest in property may be authorized without using the words "fee simple;"⁶ and even the use of these or equivalent terms may grant only a qualified ownership, a base and determinable fee, limited to the purposes of the grant, and expiring when the property ceases to be used for those purposes.⁷ The taking of a greater interest than is necessary to satisfy the

¹ *New York City & N. R. Co. v. Central Union Tel. Co.* (N. Y. Supreme Ct., May, 1880), 10 N. Y. Week. Dig. 237, 21 Hun, 261.

² *Morris & E. R. Co. v. Blair*, 1 Stock. 635; *Waterbury v. Dry Dock, E. B., & B. R. Co.*, 54 Barb. 388.

³ *Boston & M. R. v. Lowell & L. R. Co.*, 124 Mass. 368.

⁴ Chap. IX., THE LOCATION.

⁵ *Ante*, p. 147.

⁶ *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 3 Lans. 429; *Washington Cemetery v. Prospect Park & C. I. R. Co.*, 68 N. Y. 591, 7 Hun, 655; *Rexford v. Knight*, 11 N. Y. 308, 15 Barb. 627; *Watson*

v. New York Cent. R. Co., 1 Sheldon, 159, 47 N. Y. 157; *Dingley v. Boston*, 100 Mass. 544; *Gardner v. Brookline*, 127 Mass. 358; *Holt v. Somerville*, 127 Mass. 408; *Malone v. Toledo*, 34 Ohio St. 541, 28 Ohio St. 643; *New Orleans P. R. Co. v. Gay*, 31 La. An. 430.

⁷ *Hooker v. Utica & M. Turnp. Co.*, 12 Wend. 371; *People v. White*, 11 Barb. 26; *Malone v. Toledo*, 28 Ohio St. 643, 655, 656, 34 Ohio St. 541; *Bostock v. North Staffordshire R. Co.*, 3 Smale, & G. 283; 5 De Gex & S. 584, 4 El. & B. 798; *Norton v. London & N. W. R. Co.*, L. R. 9 Ch. Div. 623, L. R. 13 Ch. Div. 268.

language and object of the statute is not to be presumed.¹ Where, by proper construction of the statute, the fee is taken, the land does not revert to the owner when the public use ceases.²

The grant of a right to take land "for the purposes of a railroad" authorizes the taking of only an easement, leaving the fee with the owner to whom the right of possession reverts on the cessation of the public use;³ and this is the limited interest usually given by statutes authorizing the condemnation of land for railroads.⁴ The property is, however, to be deemed taken for a public use itself, rather than for the peculiar use and enjoyment by the party to whose possession it passes. It does not therefore revert to the owner upon a mere transfer of the railroad to another company,⁵ nor upon its appropriation to another similar public use.⁶

Where only an easement is taken for the purposes of a railroad, and the land is applied to other uses, the owner is entitled to legal and equitable remedies to establish his right.⁷ But such misappropriation cannot be taken advantage of collaterally.⁸

¹ *Washington Cemetery v. Prospect Park & C. I. R. Co.*, 68 N. Y. 591, 7 Hun, 655.

² *Rexford v. Knight*, 11 N. Y. 308; *Sweet v. Buffalo*, N. Y., & P. R. Co., 13 Hun, 643; *De Varaigne v. Fox*, 2 Blatch. 95; *Haldeman v. Penn. Cent. R. Co.*, 50 Pa. St. 425; *Robinson v. West Penn. R. Co.*, 72 Pa. St. 316; *Wyoming Coal & T. Co. v. Price*, 81 Pa. St. 156; *Penn. & N. Y. Canal & R. Co. v. Billings* (Penn. S. C., May, 1880), 37 Leg. Intel. 332; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Mason v. Lake Erie, E., & S. W. R. Co.* (U. S. C. C., D. Ind.), 1 Fed. Rep. 712.

³ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1; *Blake v. Rich*, 34 N. H. 282; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504, 515; *Heard v. Brooklyn*, 60 N. Y. 242; *Western Penn. R. Co. v. Johnston*, 59 Pa. St. 290; *State v. Brown*, 3 Dutcher, 13; *Taylor v. New York & L. B. R. Co.*, 9 Vroom, 28; *Quimby v. Vt. Cent. R. Co.*, 23 Vt. 387; *Troy & B. R. Co. v. Potter*, 42 Vt. 265, 274. Accordingly, the location of a railroad is held not to be a breach of a covenant of seisin contained in an owner's

deed of land within it to a third party, though a breach of the covenant against incumbrances. *Kellogg v. Malin*, 50 Mo. 496; *Beach v. Miller*, 51 Ill. 206; *Barlow v. McKinley*, 24 Iowa, 69.

⁴ *Alabama & F. R. Co. v. Burkett*, 42 Ala. 83, 91; *Aldrich v. Drury*, 8 R. I. 554; *Kansas Cent. R. Co. v. Allen*, 22 Kan. 285.

⁵ *State v. Rives*, 5 Ired. 297; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288; *Noll v. Dubuque, B., & M. R. Co.*, 32 Iowa, 66; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1; *Pollard v. Maddox*, 28 Ala. 321.

⁶ *Haldeman v. Penn. Cent. R. Co.*, 50 Pa. St. 425; *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 92, 120; *Malone v. Toledo*, 28 Ohio St. 643, 656, 34 Ohio St. 541.

⁷ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 23; *Bostock v. North Staffordshire R. Co.*, 3 Smale & G. 283, 5 De Gex & S. 584, 4 El. & Bl. 798.

⁸ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1.

Though only an easement is taken for the public use, no deduction is made, in practice, in the assessment of damages for the reversionary right.¹

The Company's Right of Possession exclusive within the Location.—The interest of a railroad company in its location, although technically an easement, is not limited to an ordinary right of way, such as is acquired for highways, but it justifies a use of the land for all the purposes of a railroad.² Its possession, except at crossings established by law, is permanent in its nature, and practically exclusive, such possession being essential to a safe and effective working of its machinery.³ It may within its location erect buildings required in its business,⁴ or allow others to erect them;⁵ maintain a line of telegraph for its own use;⁶ use the materials found within it, as stone, gravel, and timber, in the construction and repair of any part of its line;⁷

¹ *Murray v. County Com'rs*, 12 Met. 455; *Bemis v. Springfield*, 122 Mass. 110, 118; *Washington Cemetery v. Prospect Park & C. I. R. Co.*, 68 N. Y. 591.

² *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150, 159; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288; *post*, Chap. XIX, p. 496.

³ *Hazen v. Boston & M. R.*, 2 Gray, 574; *Curtis v. Eastern R. Co.*, 14 Allen, 55; *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1; *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150, 159; *Conn. & P. R. R. Co. v. Holton*, 32 Vt. 43; *Troy & B. R. Co. v. Potter*, 42 Vt. 265; *Aldrich v. Drury*, 8 R. I. 554; *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 92, 122; *Pittsburg, Ft. W., & C. R. Co. v. Bingham*, 29 Ohio St. 364, 370; *Lake Superior & M. R. Co. v. Greve*, 17 Minn. 322; *Burnett v. N. & C. R. Co.*, 4 Sneed, 528; *Jeffersonville, M., & I. R. Co. v. Goldsmith*, 47 Ind. 43; *Disbrow v. Chicago & N. W. R. Co.*, 70 Ill. 246; *Phil. & R. R. Co. v. Hummell*, 44 Pa. St. 375; *Junction R. Co. v. Philadelphia*, 88 Pa. St. 424; *Cordell v. New York Cent. R. Co.*, 70 N. Y. 119, 64 N. Y. 585; *Norton v. London & N. W. R. Co.*, L. R. 9 Ch. Div. 623, 13 Ch. Div. 268. *Contra*, *Kansas Cent. R. Co. v. Allen*, 22 Kan. 285. Under an agreement by which

a company succeeds to the use of a railroad, its possession is exclusive against the company owning it. *Sevenoaks, M., & T. R. Co. v. London, C., & D. R. Co.*, L. R. 11 Ch. Div. 625.

⁴ *Worcester v. Western R. Co.*, 4 Met. 564; *Commonwealth v. Haverhill*, 7 Allen, 523; *Boston Gas Light Co. v. Old Colony & N. R. Co.*, 14 Allen, 444; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1; *Lance's Appeal*, 55 Pa. St. 16.

⁵ *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Western Union Tel. Co. v. Rich*, 19 Kan. 517.

⁶ *Prather v. Jeffersonville, M., & I. R. Co.*, 52 Ind. 16; *Western Union Tel. Co. v. Rich*, 19 Kan. 517.

⁷ *Chapin v. Sullivan R.*, 39 N. H. 564; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288; *Aldrich v. Drury*, 8 R. I. 554; *Taylor v. New York & L. B. R. Co.*, 9 Vroom, 28. It cannot use the timber for fuel. *Preston v. Dubuque & P. R. Co.*, 11 Iowa, 15. The statutes of New Hampshire have been held not to authorize the use of timber found within the location for the purposes of construction. *Blake v. Rich*, 34 N. H. 282. Minerals below the bed of the road belong to the land-owner. *Evans v. Haefner*, 29 Mo. 141; *Blake v. Rich*, 34 N. H. 282. As to the property

cut growing trees, whether used for shade, ornament, or fruit, as well after as at the time of construction;¹ remove dwelling-houses from it;² erect fences along the track, which will exclude adjoining owners from crossing;³ and trim the hedges which overhang its location.⁴ It may use its location for all the purposes of a railroad, but for no other, and it is itself the judge of the exigency requiring such use in each case.⁵ It may lay its tracks, side tracks as well as main tracks, at any place within the location, and shift them from place to place within it;⁶ and also lay them on land acquired by purchase, or on land of individuals with their consent.⁷

The company cannot, as to land taken under the right of eminent domain, do acts which, though lawful in a private land-owner, are altogether outside of railroad purposes. Thus, it cannot by means of hoardings shut out the light from an adjoining proprietor who has not acquired a presumptive right to it.⁸ It cannot, it has been held, merely to save expense, erect and work a mortar-mill which causes a noise and vibration injurious to a tradesman's business.⁹

The company is authorized to use the materials found within the location only for the purposes of the railroad, without the right to sell them;¹⁰ nor does its right extend beyond its location, so as to justify a use of the adjoining land.¹¹ The land-owner, where a right of way is not reserved by agreement or fixed by statute, has no right to cross a location which has divided

in the minerals under the English act, see *Fletcher v. Great Western R. Co.*, 4 H. & N. 242, 5 H. & N. 689. The land-owner may lay pipes under the railroad in a manner not to interfere with the company's use of its location. *Hasson v. Oil Creek & A. R. R. Co.*, 8 Phil. 556.

¹ *Brainard v. Clapp*, 10 Cush. 6; *Western Union Tel. Co. v. Rich*, 19 Kan. 517.

² *Brocket v. Ohio & P. R. Co.*, 14 Pa. St. 241.

³ *Boston Gas Light Co. v. Old Colony & N. R. Co.*, 14 Allen, 444; *Presbrey v. Old Colony R. Co.*, 103 Mass. 1; *Carson v. Western R. Co.*, 8 Gray, 423; *Mason v. Kennebec & P. R. Co.*, 31 Me. 215.

⁴ *Toledo, W., & W. R. Co. v. Green*, 67 Ill. 199.

⁵ *Brainard v. Clapp*, 10 Cush. 6;

Curtis v. Eastern R. Co., 14 Allen, 55, 58.

⁶ *Commonwealth v. Haverhill*, 7 Allen, 523; *Stark v. Sioux City & P. R. Co.*, 43 Iowa, 501; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325.

⁷ *Bangor, O., & M. R. Co. v. Smith*, 47 Me. 34, 49 Me. 9.

⁸ *Norton v. North London & N. W. R. Co.*, L. R. 9 Ch. Div. 623, 13 Ch. Div. 268.

⁹ *Fenwick v. East London R. Co.*, L. R. 20 Eq. Cas. 544.

¹⁰ *Aldrich v. Drury*, 8 R. I. 554; *Taylor v. New York & L. B. R. Co.*, 9 Vroom, 28; *Chapin v. Sullivan R. Co.*, 39 N. H. 564.

¹¹ *Hay v. Cohoes Co.*, 2 N. Y. 159; *St. Peter v. Denison*, 58 N. Y. 416.

his land;¹ nor can he enter upon it to remove grass or turf.²

The company, on abandoning its road, may remove structures, as stone piers, which it has erected in the course of construction, although firmly imbedded in the earth.³

The company's right to its location must, like other rights of proprietorship, yield to temporary public exigencies. Thus, firemen in the service of a city may lay a hose across the track for the purpose of extinguishing a fire.⁴

Compensation required. — The Constitution of the United States provides, in the fifth article of the amendments, "Nor shall private property be taken for public uses without just compensation." This clause restricts the power of Congress, but not that of the States.⁵ A similar provision, designed to protect private rights, is generally found in the constitutions of the several States.⁶ The right to compensation is, however, incident to the exercise of the power, and exists although not affirmed by the Constitution.⁷ The construction of the provision in the

¹ *Conn. & P. R. Co. v. Holton*, 32 Vt. 43; *Boston Gas Light Co. v. Old Colony & N. R. Co.*, 14 Allen, 444; *Ham v. Salem*, 100 Mass. 350; *Presbrey v. Old Colony R. Co.*, 103 Mass. 1; *Old Colony R. Co. v. Miller*, 125 Mass. 1; *Drury v. Midland R. Co.*, 127 Mass. 571, 584. But see *Kansas Central R. Co. v. Allen*, 22 Kan. 285. The crossing, when established by law or agreement, may be used hereafter for proper purposes, without being limited to the extent of use practised when it was established. *United Land Co. v. Great Eastern R. Co.*, L. R. 10 Ch. App. 586, L. R. 17 Eq. Cas. 158.

² *Conn. & P. R. Co. v. Holton*, 32 Vt. 43; *Trby & B. R. Co. v. Potter*, 42 Vt. 265.

³ *Wagner v. Cleveland & T. R. Co.*, 22 Ohio St. 563; *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28. See *ante*, Chap. VI. p. 131.

⁴ *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277; *Hyde Park v. Gay*, 120 Mass. 589; *Sweeney v. Boston & A. R. Co.*, 128 Mass. 5. See *Mott v. Hudson River R. R. Co.*, 1 Robertson, 585, 8 Bosw. 345.

⁵ *Barron v. Baltimore*, 7 Peters, 243; *Withers v. Buckley*, 20 How. 84; *Pum-*

pelly v. Green Bay Co., 13 Wall. 166; *Concord R. v. Greely*, 17 N. H. 47; *Cairo & F. R. Co. v. Turner*, 31 Ark. 494. Whether compensation for property taken by the United States can be recovered in the Court of Claims, see *Langford v. United States*, 101 U. S. 341.

⁶ The Constitution of Illinois, which requires compensation for property "taken or damaged," does not require compensation beyond the value of the part taken, where the owner's remaining property is not depreciated in value. *Chicago & P. R. Co. v. Francis*, 70 Ill. 238; *Page v. Chicago, M., & St. P. R. Co.*, 70 Ill. 324; *Eberhart v. Chicago, M., & St. P. R. Co.*, 70 Ill. 347.

⁷ *Sinnickson v. Johnson*, 2 Harrison, 129; *Hatch v. Vt. Cent. R. Co.*, 25 Vt. 49, 66; *Mount Washington Road Co.*, 35 N. H. 134; *Ash v. Cummings*, 50 N. H. 591; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504, 510; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Martin's Case*, 13 Ark. 198, 206; *Cairo & F. R. Co. v. Turner*, 31 Ark. 494; *Henry v. Dubuque & P. R. Co.*, 10 Iowa, 540; *Johnston v. Rankin*, 70 N. C. 550; *Bradshaw v. Rodgers*, 20 Johns. 103.

constitution of a State by its own highest court is not subject to review in the Supreme Court of the United States.¹ The right to compensation exists where property is permanently appropriated for the public health and safety.² The right survives changes in the possession of the land taken, and is in the nature of a lien or incumbrance on it.³ The constitutional restriction does not apply to public property.⁴ The State may waive compensation when public property is taken, but its intention to do so is not to be presumed.⁵

Adequate and Certain Provision for Compensation.—The Constitutional prohibition requires that the statute which authorizes the taking should provide an adequate and certain remedy by which the compensation may be obtained, or otherwise the statute is void, and the owner is entitled to legal and equitable remedies for the protection of his property against acts and proceedings under color of the statute.⁶ This constitutional limitation, placed universally on the legislative power in the United States, should be noted in any comparison of English and American decisions.⁷

The omission of an adequate provision for compensation, as required by the Constitution, in the act authorizing the condemnation, may be remedied by a subsequent act,⁸ but not, it has been held, so as to give validity to proceedings instituted before the amending act took effect.⁹ The want of such a provision and

¹ Withers v. Buckley, 20 How. 84.

² Cheesebrough's Case, 78 N. Y. 232.

³ Drury v. Midland R. Co., 127 Mass. 571; Western Penn. R. Co. v. Johnston, 59 Pa. St. 290; Gilman v. Sheboygan & F. R. Co., 40 Wis. 653.

⁴ Indiana Cent. R. Co. v. State, 3 Ind. 421; Hobart v. Ford, 6 Nev. 77.

⁵ Commonwealth v. Boston & M. R., 3 Cush. 25; North Avenue, *In re*, 45 N. Y. 729. But see Penn. R. Co. v. New York & L. B. R. Co., 8 C. E. Green, 157; Davis v. East Tenn. & G. R. Co., 1 Speed, 94.

⁶ Perry v. Wilson, 7 Mass. 393; Stevens v. Middlesex Canal, 12 Mass. 466; Thacher v. Dartmouth Bridge, 18 Pick. 501; Boston & L. R. Co. v. Salem & L. R. Co., 2 Gray, 1, 36, 37; Haverhill Bridge Proprietors v. County Com'rs, 103 Mass. 120; Conn. River R. Co. v. County Com'rs, 127 Mass. 50; Drury v. Middlesex R. Co., 127 Mass. 571; Cushman v. Smith, 34 Me. 247; Lee v. Pembroke

Iron Co., 57 Me. 481; Dimmick v. Brodhead, 75 Pa. St. 464; Sinnickson v. Johnson, 2 Harrison, 129; Bonaparte v. Camden & A. R. Co., Baldwin, 205; Eaton v. Boston, C. & M. R. Co., 51 N. H. 504; Bellinger v. New York Cent. R. Co., 23 N. Y. 42; Rexford v. Knight, 11 N. Y. 308, 15 Barb. 627; Robinson v. New York & E. R. Co., 27 Barb. 512; Seneca Road Co. v. Auburn & R. R. Co., 5 Hill, 170; Walther v. Warner, 25 Mo. 277, 285; Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co., 11 Leigh, 42, 77; Hamilton v. Annapolis & E. R. R. Co., 1 Md. Ch. 107.

⁷ Eaton v. Boston, C. & M. R. Co., 51 N. H. 504, 516; Thompson v. Androscoggin Co., 54 N. H. 545, 556.

⁸ Bonaparte v. Camden & A. R. Co., Baldwin, 205; State v. Seymour, 6 Vroom, 47, 56; Cairo & F. R. Co. v. Turner, 31 Ark. 494; Shute v. Chicago & M. R. Co., 26 Ill. 486.

⁹ Conn. River R. Co. v. Com'rs, 127 Mass. 50.

other defects may be waived by the owner so as to bind himself and others claiming under him.¹

Adequate Remedy providing Compensation. — Where property is taken by the State, or one of its municipal subdivisions, a certain and expeditious way of recovering the compensation is deemed an adequate remedy. The pledge of the public faith dispenses with the need of an actual payment or security prior to the appropriation.² The statute should at least, even in this case, direct a payment from the public treasury, and not leave the citizen to resort only to some uncertain and contingent fund.³ But where a private corporation is exercising the right of eminent domain by delegation, the citizen is entitled to further protection, and some existing law must provide an efficient remedy by which he can obtain payment of compensation, or adequate security for such payment, before his property can be appropriated. The statute should provide not only a mode of assessing damages, but a definite and certain fund from which they are payable, and an appropriate remedy for enforcing its application. A right of action merely — the satisfaction of the judgment depending on the solvency of the corporation — is not a sufficient remedy.⁴

Time when Compensation must be made. — The *time* when the compensation must be made varies according to the terms of the constitutional provision and the different constructions applied to it. If the actual payment of the compensation were required to precede an entry for construction, the entry would be delayed until the amount, when not agreed upon, had been finally determined

¹ *Haskell v. New Bedford*, 108 Mass. 208; *Provolt v. Chicago*, R. I., & P. R. Co., 57 Mo. 256; *Brown v. Worcester*, 13 Gray, 31; *Embury v. Conner*, 3 N. Y. 511; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *Burns v. Mil. & M. R. Co.*, 9 Wis. 450; *Johnston v. Rankin*, 70 N. C. 550; *Morgan v. Monmouth Plank Road Co.*, 2 Dutcher, 99; *Reckner v. Warner*, 22 Ohio St. 275, 293.

² *Talbot v. Hudson*, 16 Gray, 417; *Ash v. Cummings*, 50 N. H. 591; *Orr v. Quimby*, 54 N. H. 590; *Walther v. Warner*, 25 Mo. 277; *Lowndes Co. v. Bowie*, 34 Ala. 461; *Wheeler v. Essex Public Road*, 10 Vroom, 291; *Yost's Case*, 17 Pa. St. 524; *Long v. Fuller*, 68 Pa. St.

170; *Dronberger v. Reed*, 11 Ind. 420; *Cushman v. Smith*, 34 Me. 247, 254.

³ *Conn. River R. Co. v. County Com'rs*, 127 Mass. 50.

⁴ *Ash v. Cummings*, 50 N. H. 591; *Orr v. Quimby*, 54 N. H. 590, 594; *Shepardson v. Mil. & B. R. Co.*, 6 Wis. 605; *Power v. Bears*, 12 Wis. 213; *Bohlman v. Green Bay & L. P. R. Co.*, 30 Wis. 105; *Walther v. Warner*, 25 Mo. 277; *Provolt v. Chicago*, R. I., & P. R. Co., 57 Mo. 256; *Southwestern R. Co. v. Southern & A. Tel. Co.*, 46 Ga. 43; *Buffalo Bayou, B. & C. R. Co. v. Ferris*, 2 Tex. 588; *McClinton v. Pittsburg, Ft. W., & C. R. Co.*, 66 Pa. St. 404; *St. Louis, L., & D. R. Co. v. Wilder*, 17 Kan. 239.

by legal proceedings; and such delay would often result in serious detriment to public interests. Now, although the prepayment may be necessary for absolute security, it is not essential to the reasonable certainty of compensation which the Constitution is presumed to have had in view. The legislature is to be allowed a measure of discretion in providing means for giving effect to the provision which will at the same time not interfere with the general welfare. The provision, too, it should be noted, does not undertake to secure the citizen against all injuries to his property, but only against a *taking*, — a term which designates a final transfer of title to property, or its permanent subjection to an easement. Accordingly, if the statute provides a mode of fixing the amount of the compensation, which the owner can initiate, and gives him the right to require security for its payment, when finally ascertained, leaving him legal and equitable remedies for reclaiming possession in case it is not paid, his constitutional right has been respected, although, in the possible event of the insolvency of the corporation to which the right of eminent domain has been delegated, and of its sureties, he may suffer during the pendency of proceedings from the interference with his property and the construction of public works upon it. It has, therefore, been held that, in the absence of a distinct provision in the Constitution requiring the prepayment of compensation, such prepayment need not precede an entry for the construction of a railroad, if some existing law affords an adequate remedy for obtaining it;¹ and the provision is complied with, if, in place of such prepayment, a deposit of a certain

¹ *Bloodgood v. Mohawk & H. R. Co.*, 14 Wend. 51, 18 Wend. 9; *Rexford v. Knight*, 11 N. Y. 308, 15 Barb. 627; *Chapman v. Gates*, 54 N. Y. 132; *Smith v. Helmer*, 7 Barb. 416, 426; *Fox v. Western Pacific R. Co.*, 31 Cal. 538; *Raleigh & G. R. Co. v. Davis*, 2 Dev. & B. 451; *Levering v. Phil., G., & N. R. Co.*, 8 W. & S. 459; *Pittsburg v. Scott*, 1 Pa. St. 309; *Commonwealth v. Pittsburg & C. R. Co.*, 58 Pa. St. 26; *Koch v. Williamsport Water Co.*, 65 Pa. St. 288; *Danville, H., & W. R. Co. v. Commonwealth*, 73 Pa. St. 29; *Den v. Morris Canal & B. Co.*, 4 Zab. 587; *Lehigh Valley R. Co. v. McFarlan*, 4 Stewart (N. J.), 706, 722, 730, 3 Stewart (N. J.), 180; *Hatch v. Vermont*

Cent. R. Co., 25 Vt. 49, 66, 28 Vt. 142; *Hankins v. Lawrence*, 8 Blackf. 266; *New Albany & S. R. Co. v. Connelly*, 7 Ind. 32; *Jeffersonville, M., & I. R. Co. v. Daugherty*, 40 Ind. 33; *Prather v. Jeffersonville, M., & I. R. Co.*, 52 Ind. 16, 41; *Bonaparte v. Camden & A. R. Co.*, Baldwin, 205; *Ash v. Cummings*, 50 N. H. 591; *Orr v. Quimby*, 54 N. H. 590; *Johnson v. Joliet & C. R. Co.*, 23 Ill. 202; *Townsend v. Chicago & A. R. Co.*, 91 Ill. 545; *Haverhill Bridge Proprietors v. County Com'rs*, 103 Mass. 120; *White v. Nashville & N. W. R. Co.*, 7 Heisk. 518; *Simms v. Memphis, C., & L. R. Co.*, 12 Heisk. 621.

amount in court, or a bond with sufficient sureties, — the amount and sufficiency to be determined by some impartial tribunal or body, — is required.¹

The constitutional provision, it has been decided, does not require the payment of the compensation to precede an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title or easement, but only the acquisition of the title or easement, or a permanent appropriation. If, however, compensation is not made or tendered within a reasonable time after the exclusive occupancy has commenced, the right to continue it will cease, and the parties whose possession has become illegal will be liable as trespassers.² The company is at once a tres-

¹ New York Central & H. R. R. Co., *In re*, 60 N. Y. 116; Fox v. Western Pacific R. Co., 31 Cal. 538; Cairo & F. R. Co. v. Turner, 31 Ark. 494; Wadhams v. Lackawanna & B. R. Co., 42 Pa. St. 303; McClinton v. Pittsburgh, Ft. W., & C. R. Co., 66 Pa. St. 404; Fries v. Southern Penn., R., & M. Co., 85 Pa. St. 73; Powers v. Bears, 12 Wis. 213; Gray v. St. Paul & P. R. Co., 13 Minn. 315; Hursh v. St. Paul & P. R. Co., 17 Minn. 439; Weir v. St. Paul, S., & T. F. R. Co., 18 Minn. 155; Warren v. St. Paul & P. R. Co., 18 Minn. 384; Curtis v. St. Paul, S., & T. F. R. Co., 21 Minn. 497; Johnson v. Joliet & C. R. Co., 23 Ill. 202; Shute v. Chicago & M. R. Co., 26 Ill. 436. *Contra*, Sanborn v. Belden, 51 Cal. 266; Vilhac v. Stockton & I. R. Co., 53 Cal. 208. If the bond is not paid, an injunction may be obtained. Cairo & T. F. R. Co. v. Turner, 31 Ark. 494. But see Fries v. Southern Penn., R., & M. Co., 85 Pa. St. 73. Failure to apply for a bond does not waive the right to an injunction for non-payment. White v. Nashville & N. R. Co., 7 Heisk. 518. The bond must be approved as required by law. Dimmick v. Brodhead, 75 Pa. St. 464.

² In Bloodgood v. Mohawk & H. R. R. Co., 14 Wend. 51, it was considered that, after an unreasonable delay in making compensation, the owner would be entitled to an ample remedy; but whether the parties, acting under color of legislative authority, were trespassers or not, was not decided. In Cushman v. Smith, 34 Me. 247, the following conclusions were arrived at by the court: "(1.) The

clause in constitutions which prohibits the taking of private property for public use was not designed to operate, and it does not operate, to prohibit the legislative department from authorizing an exclusive occupation of private property temporarily, as an incipient proceeding to the acquisition of a title to it or to an easement in it. (2.) It was designed to operate, and it does operate, to prevent the acquisition of any title to land or to an easement in it, or to a permanent appropriation of it from an owner for public use, without the actual payment or tender of a just compensation for it. (3.) That the right to such temporary occupation as an incipient proceeding will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation to acquire a title to the land or of an easement in it. (4.) That an action of trespass *quare clausum* may be maintained to recover damages for the continuance of such occupation, unless compensation or a tender of it be made within a reasonable time after the commencement of it. (5.) That under such circumstances an action of trespass or an action on the case may be maintained to recover damages for all the injuries occasioned by the prior occupation." Nichols v. Somerset & K. R. Co., 43 Me. 356; Fox v. Western Pacific R. Co., 31 Cal. 538; Levering v. Phil., G., & N. R. Co., 8 W. & S. 459; Raleigh & G. R. Co. v. Davis, 2 Dev. & Bat. 451, 464; Walther v. Warner, 25 Mo. 277.

passer, if, being entitled only to enter for the temporary purpose, it asserts a greater right, to wit, that of permanent occupation.¹

Some authorities regard a payment or tender of the compensation as a condition precedent to an entry for the construction of the road, even in the absence of any clause in the Constitution expressly requiring such prepayment.²

Several State constitutions provide that private property shall not be taken for public use without compensation being first made, or contain similar terms. The effect of this provision is to require the payment or tender of the compensation to precede an entry for the construction of the railroad.³ The prepayment has, in some cases, been required by statute, when not required by the Constitution.⁴

Under a constitutional or statute provision making prepayment or tender of compensation a condition precedent to an entry, the owner is entitled to the possession until the compensation as finally determined is paid or tendered; and, pending an appeal from an assessment, he may retain such possession.⁵ In some jurisdictions where prepayment is required, the company is allowed to enter, on paying or depositing the assessment first made.⁶

¹ *Hall v. Pickering*, 40 Me. 548; *Gowen v. Penobscot R. Co.*, 44 Me. 140; *Davis v. Russell*, 47 Me. 443.

² *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. 9; *Blodgett v. Utica & B. R. R. Co.*, 64 Barb. 580; *Walther v. Warner*, 25 Mo. 277; *San Francisco & S. J. R. Co. v. Mahoney*, 29 Cal. 112; *Cook v. South Park Com'rs*, 61 Ill. 115; *People v. McRoberts*, 62 Ill. 38. In Illinois, prepayment for consequential injuries need not precede an occupation. *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74; *Patterson v. Chicago, D. & V. R. Co.*, 75 Ill. 588; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135.

³ *Doughty v. Somerville & E. R. Co.*, 3 Halst. Ch. 51; *Thompson v. Grand Gulf R. & B. Co.*, 3 How. (Miss.) 240; *Stewart v. Raymond R. Co.*, 7 Smedes & M. 568; *Memphis & C. R. Co. v. Payne*, 37 Miss. 700; *Pearson v. Johnson*, 54 Miss. 259; *Henry v. Dubuque & P. R. Co.*, 10 Iowa, 540; *Daniels v. Chicago, I., & N. W. R. Co.*, 35 Iowa, 129, 41 Iowa, 52; *Hibbs v. Chicago & S. W. R. Co.*, 39 Iowa, 340; *Eidemiller v. Wyandotte City*, 2 Dill. 376; *Missouri*,

K., & T. R. Co. v. Ward, 10 Kan. 352; *St. Joseph & D. C. R. Co. v. Callender*, 13 Kan. 496; *Indianapolis & C. R. Co. v. Brower*, 12 Ind. 374; *Sidener v. Norristown, H., & St. L. Turnp. Co.*, 23 Ind. 623; *Graham v. Columbus & I. C. R. Co.*, 27 Ind. 260; *Aurora & C. R. Co. v. Miller*, 56 Ind. 88; *Sherman v. Mil., L. S., & W. R. Co.*, 40 Wis. 645; *Teick v. Carver County*, 11 Minn. 292; *Northern Pacific R. Co. v. St. Paul, M., & M. R. Co.* (U. S. C. C., D. Minn.), 3 Fed. Rep. 702.

⁴ *McAulay v. Western Vt. R. Co.*, 33 Vt. 311; *Marion & M. V. R. Co. v. Ward*, 9 Ind. 123.

⁵ *Browning v. Camden & W. R. T. Co.*, 3 Green Ch. 47; *Iowa College v. Davenport*, 7 Iowa, 213; *Eidemiller v. Wyandotte City*, 2 Dill. 376; *St. Joseph & D. C. R. Co. v. Callender*, 13 Kan. 496; *Kansas City v. Kansas P. R. Co.*, 18 Kan. 331; *Davis v. San Lorenzo R. Co.*, 47 Cal. 517; *Northern Pacific R. Co. v. St. Paul, M., & M. R. Co.* (U. S. C. C., D. Minn.), 3 Fed. Rep. 702.

⁶ *Peterson v. Ferreby*, 30 Iowa, 327;

Remedies of Land-owners to whom Compensation has not been made. Actions at Law and Remedy in Equity. — A company entering on land for the construction of the road without complying with the statute provisions for compensation, or assuming to act under a statute which does not provide compensation as required by the Constitution, is liable to an action of trespass,¹ or of ejectment,² and to be enjoined in equity;³ and these remedies are likewise available to the owner against any parties who claim under the company which made the entry.⁴

Mercer & S. R. Co. v. Delaware & B. B. R. Co., 11 C. E. Green, 464; *Mettler v. Easton & A. R. Co.*, 10 C. E. Green, 214. The money when so deposited remains at the risk of the company. *Blackshire v. Atchison, T., & S. F. R. Co.*, 13 Kan. 514.

¹ *People v. Hillsdale & C. T. Co.*, 2 Johns. 190; *Perry v. Wilson*, 7 Mass. 393; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Robinson v. New York & E. R. Co.*, 27 Barb. 512, 520; *Blodgett v. Utica & B. R. R. Co.*, 64 Barb. 580; *Sinnickson v. Johnson*, 2 Harrison, 129; *Tinsman v. Belvidere Del. R. Co.*, 2 Dutcher, 148, 174; *Hooker v. New Haven & N. Co.*, 14 Conn. 146, 15 Conn. 312; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28; *Smart v. Portsmouth & C. R. Co.*, 20 N. H. 233; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504; *Henry v. Dubuque & P. R. Co.*, 10 Iowa, 540; *Loop v. Chamberlain*, 20 Wis. 135; *Sherman v. Mil., L. S., & W. R. Co.*, 40 Wis. 645; *Blesch v. Chicago & N. W. R. Co.*, 43 Wis. 183; *Evansville & C. R. Co. v. Dick*, 9 Ind. 433; *Indiana R. Co. v. Boden*, 10 Ind. 96; *Memphis & C. R. Co. v. Payne*, 37 Miss. 700; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Buffalo Bayou, B., & C. R. Co. v. Ferris*, 26 Tex. 588. An unlawful occupation is a continuing trespass. *Mathews v. St. Paul & S. C. R. Co.*, 18 Minn. 434.

² *Daniels v. Chicago & N. W. R. Co.*, 35 Iowa, 129, 41 Iowa, 53; *Gilman v. Sheboygan & F. R. Co.*, 40 Wis. 653; *Conger v. Burlington & S. W. R. Co.*, 41 Iowa, 419; *Holbert v. St. Louis, K. C., & N. R. Co.*, 45 Iowa, 23; *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655; *Lev-*

ering v. Phil., G., & N. R. Co., 8 W. & S. 459; *McClinton v. Pittsburg, Ft. W., & C. R. Co.*, 66 Pa. St. 404; *Wilmington & R. R. Co. v. High*, 89 Pa. St. 282, 286; *Graham v. Columbus & I. C. R. Co.*, 27 Ind. 260; *Cox v. Louisville, N. A., & C. R. Co.*, 48 Ind. 178, 194; *Smith v. Chicago, A., & St. L. R. Co.*, 67 Ill. 191; *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316; *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215; *St. Joseph & D. C. R. Co. v. Callender*, 13 Kan. 496; *Pearson v. Johnson*, 54 Miss. 259.

³ *Browning v. Camden & W. R. Co.*, 3 Green Ch. 47; *Delaware & R. Co. v. Raritan & D. B. Co.*, 1 C. E. Green, 321, 381; *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, 10 C. E. Green, 384; *New Central Coal Co. v. George's Creek Coal & I. Co.*, 37 Md. 537, 566; *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423; *Lumsden v. Milwaukee*, 8 Wis. 485; *Powers v. Bears*, 12 Wis. 213; *Bohlman v. Green Bay & L. P. R. Co.*, 30 Wis. 105; *Diedrich v. Northwestern Union R. Co.*, 33 Wis. 219; *Gilman v. Sheboygan & F. R. Co.*, 40 Wis. 643; *Eidemiller v. Wyandotte City*, 2 Dill. 376; *Richards v. Des Moines Valley R. Co.*, 18 Iowa, 259; *Hibbs v. Chicago & S. W. R. Co.*, 39 Iowa, 340; *Holbert v. St. Louis, K. C., & N. R. Co.*, 45 Iowa, 23; *Sidener v. Norristown, H., & St. L. Turnp. Co.*, 23 Ind. 623; *Norristown, H., & St. L. Turnp. Co. v. Burket*, 26 Ind. 53; *Evans v. Mo., I., & N. R. Co.*, 64 Mo. 453; *Penrice v. Wallis*, 37 Miss. 172; *White v. Nashville & N. R. Co.*, 7 Heisk. 518.

⁴ *Gilman v. Sheboygan & F. R. Co.*, 40 Wis. 653; *Western Penn. R. Co. v. Johnston*, 59 Pa. St. 290; *Drury v. Midland R. Co.*, 127 Mass. 571.

Injunctions, when granted. — The remedy by injunction is granted in the discretion of the court, and may be applied to enjoin the company from entering to construct its road without proper authority, or without having taken the steps required by law, wherever irreparable injury to a land-owner is impending, and his right is clear, and an action at law would not be a complete remedy.¹ It may be resorted to for the protection of franchises where the attempted appropriation does not conform to the constitutional and legal method.² It has been granted to restrain the company from the negligent use of its powers to the injury of the land-owner.³ The remedy is denied where it is not sought seasonably,⁴ or where the complainant has by some agreement or by his conduct given an actual or implied assent to the illegal entry, and expensive works have been constructed.⁵ It is sometimes withheld temporarily, to give the company an opportunity to obtain the land by negotiation or legal proceedings;⁶ and the company has even been allowed, when enjoined for not having complied with the constitutional provision, to obtain a title by paying the compensation found due by the court.⁷

Release of Right to Compensation. — The land-owner may release his right to compensation, but the release is not to be extended beyond its terms. Thus, a release of damages occasioned by the construction of the railroad upon his own land

¹ Bonaparte v. Camden & A. R. Co., Baldwin, 205; Morris Canal & B. Co. v. Central R. Co., 1 C. E. Green, 419; Stevens v. Paterson & N. R. Co., 5 C. E. Green, 126; Higbee v. Camden & A. R. & T. Co., 5 C. E. Green, 435; Morris Canal & B. Co. v. Fagin, 7 C. E. Green, 430; Citizens' Coach Co. v. Camden Horse R. Co., 2 Stewart (N. J.), 299, 1 Stewart (N. J.), 145; Stewart's Appeal, 56 Pa. St. 413; Bassett v. Salisbury Man. Co., 47 N. H. 426; Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215. See Dowling v. Pontypool, C., & N. R. Co., L. R. 18 Eq. Cas. 714. The amount of damage is immaterial where the company exceeds its statutory powers. Commonwealth v. Pittsburg & C. R. Co., 24 Pa. St. 159.

² Boston & L. R. Co. v. Salem & L. R. Co., 2 Gray, 1; Jersey City Gas Co. v. Dwight, 2 Stewart (N. J.), 242.

³ Biscoe v. Great Eastern R. Co., L. R. 16 Eq. Cas. 636.

⁴ Attorney-General v. New York & L. B. R. Co., 9 C. E. Green, 49; Bassett v. Salisbury Man. Co., 47 N. H. 426.

⁵ Pickert v. Ridgefield Park R. Co., 10 C. E. Green, 316; Attorney-General v. Del. & B. B. R. Co., 12 C. E. Green, 1; Meredith v. Sayre, 5 Stewart (N. J.), 557; Pettibone v. LaCrosse & M. R. Co., 14 Wis. 443; Vilas v. Mil. & M. R. Co., 15 Wis. 233; Goodin v. Cincinnati & W. C. Co., 18 Ohio St. 169; Jefferson & L. P. R. Co. v. New Orleans, 31 La. An. 478; Cape Girardeau & B. M. G. Road v. Renfro, 58 Mo. 265; Lexington & O. R. Co. v. Ormsby, 7 Dana, 276. But see Murdock v. Prospect Park & C. I. R. Co., 73 N. Y. 579.

⁶ Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215, 228; Lohman v. St. Paul, S., & T. F. R. Co., 18 Minn. 174.

⁷ Henderson v. New York Cent. R. Co., 78 N. Y. 423, 17 Hun, 344. See post, p. 230.

does not release damages occasioned to his remaining land by its construction upon the land of another.¹

Waiver, Acquiescence, Laches. — The land-owner may, even by parol, waive the right, where it exists, to prepayment as a condition precedent to an entry for construction, and having waived it he cannot treat the company's possession as unlawful. The waiver may be made by a contract with the company for the payment of the compensation at a time subsequent to the entry, and the contract has the effect of converting the owner's lien on the land into a debt.² The company's breach of the conditions subsequent in the contract does not entitle him to reclaim possession,³ although the contract expressly reserves legal and equitable remedies.⁴ Some authorities recognize the existence of a land-owner's lien, like a vendor's, where the company fails to perform the conditions on which he allowed it to enter without prepayment of the compensation.⁵

A land-owner's delay in enforcing his rights does not effect a waiver of his right to prepayment;⁶ but a clear acquiescence in

¹ *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504.

² *McAulay v. Western Vt. R. Co.*, 33 Vt. 311; *Knapp v. McAuley*, 39 Vt. 275; *Troy & B. R. Co. v. Potter*, 42 Vt. 265; *Austin v. Rutland R. Co.*, 45 Vt. 215, 239; *Smart v. Portsmouth & C. R. Co.*, 20 N. H. 233; *Hornback v. Cincinnati & Z. R. Co.*, 20 Ohio St. 81; *Pettibone v. LaCrosse & M. R. Co.*, 14 Wis. 443; *Vilas v. Mil. & M. R. Co.*, 15 Wis. 233; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 420, 9 C. E. Green, 455; *Pickert v. Ridgefield Park R. Co.*, 10 C. E. Green, 316; *Coe v. New Jersey M. R. Co.*, 3 Stewart (N. J.), 21; *Baker v. Chicago, R. I., & P. R. Co.*, 57 Mo. 265; *Baltimore, P., & C. R. Co. v. Highland*, 48 Ind. 381; *Williamston & T. R. Co. v. Battle*, 66 N. C. 540.

³ See cases cited in note 2. But see *Evansville, H., & N. R. Co. v. Grady*, 6 Bush, 144; *Unangst's Appeal*, 55 Pa. St. 128. An agreement to stay execution on a judgment for damages for a certain time does not take away the right to an injunction upon non-payment at its expiration. *Irish v. Burlington & S. W. R. Co.*, 44 Iowa, 380.

⁴ *Coe v. Columbus, P., & I. R. Co.*, 10 Ohio St. 372, 411. In England, the unpaid vendor is not entitled to an injunction till he has obtained a judgment. *Latimer v. Aylesbury & B. R. Co.*, L. R. 9 Ch. Div. 385.

⁵ *McAulay v. Western Vt. R. Co.*, 33 Vt. 311; *Knapp v. McAuley*, 39 Vt. 275; *Provolt v. Chicago, R. I., & P. R. Co.*, 57 Mo. 256, 69 Mo. 633; *Evans v. Mo., I., & N. R. Co.*, 64 Mo. 453; *Dayton, X., & B. R. Co. v. Lewton*, 20 Ohio St. 401; *Gillson v. Savannah & C. R. Co.*, 7 S. C. 173. See *Hamilton v. Annapolis & E. R. Co.*, 1 Md. Ch. 107; *Walker v. Ware, H., & B. R. Co.*, L. R. 1 Eq. Cas. 195; *Bishop of Winchester v. Mid-Hants R. Co.*, L. R. 5 Eq. Cas. 17; *Munns v. Isle of Wight R. Co.*, L. R. 8 Eq. Cas. 653; *Lycett v. Stafford & U. R. Co.*, L. R. 13 Eq. Cas. 261; *Earl Ferrers v. Stafford & U. R. Co.*, L. R. 13 Eq. Cas. 524.

⁶ *Walker v. Chicago, R. I., & P. R. Co.*, 57 Mo. 275; *Cape Girardeau & B., M., & G. Road Co. v. Renfro*, 58 Mo. 265; *Evans v. Mo., I., & N. R. Co.*, 64 Mo. 453; *St. Joseph & D. C. R. Co. v. Callender*, 13 Kan. 496; *Bohlman v. Green Bay & L. P. R. Co.*, 30 Wis. 105; *Gilman v. Sheboygan*

the company's taking possession and constructing its works under circumstances making it his duty to resist the entry, if he intended afterwards to set up that it was illegal, will be treated as a waiver.¹ The waiver, however, while depriving him of the right to dispossess the company, does not deprive him of the right to damages under the special remedy.² The effect of a parol license to enter on land has already been considered.³

Strict Compliance with the Statute required.—The company in exercising the power of eminent domain must perform the conditions which the statute requires to precede the taking, and must strictly pursue the authority conferred and take the steps required.⁴ An entry without the consent of the owner, or without complying with the conditions required, is actionable.⁵ But where jurisdiction has been acquired, the proceedings cannot be attacked collaterally.⁶

& F. R. Co., 40 Wis. 653; *Blesch v. Chicago & N. W. R. Co.*, 43 Wis. 183; *Mathews v. St. Paul & S. C. R. Co.*, 18 Minn. 434; *Hibbs v. Chicago & S. W. R. Co.*, 39 Iowa, 340; *Irish v. Burlington & S. W. R. Co.*, 44 Iowa, 380; *White v. Nashville & N. W. R. Co.*, 7 Heisk. 518.

¹ *McAulay v. Western Vt. R. Co.*, 33 Vt. 311; *Provolt v. Chicago, R. I., & P. R. Co.*, 57 Mo. 256, 69 Mo. 633; *Attorney-General v. New York & L. B. R. Co.*, 9 C. E. Green, 49; *Pickert v. Ridgfield Park R. Co.*, 10 C. E. Green, 316; *Cairo & F. R. Co. v. Turner*, 31 Ark. 494, 510; *Pettibone v. LaCrosse & M. R. Co.*, 14 Wis. 443; *Andrews v. Farmers' Loan & T. Co.*, 22 Wis. 288; *Lexington & O. R. Co. v. Ormsby*, 7 Dana, 276; *Taylor v. Pettijohn*, 24 Ill. 312; *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio, 169; *Hentz v. Long Island R. Co.*, 13 Barb. 646; *Harlow v. Marquette, H., & O. R. Co.*, 41 Mich. 336. But see *Conger v. Burlington & S. W. R. Co.*, 41 Iowa, 419; *Evans v. Mo., I., & N. R. Co.*, 64 Mo. 453.

² *Western Penn. R. Co. v. Johnston*, 59 Pa. St. 290; *Smart v. Portsmouth & C. R. Co.*, 20 N. H. 233; *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215; *Harlow v. Marquette & O. R. Co.*, 41 Mich. 336; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 453.

³ *Ante*, Chap. VI. p. 131.

⁴ *Adams v. Saratoga & W. R. Co.*, 10 N. Y. 328; *City of Buffalo, In re*, 78 N. Y.

362; *New York & B. R. Co., In re*, 62 Barb. 85; *Levering v. Phil., G., & N. R. Co.*, 8 W. & S. 459; *O'Hara v. Penn. R. Co.*, 25 Pa. St. 445; *Penn. R. Co. v. Porter*, 29 Pa. St. 165; *Dimmick v. Brodhead*, 75 Pa. St. 464; *Darlington v. United States*, 82 Pa. St. 382; *West Va. Trans. Co. v. Volcanic O. & C. Co.*, 5 W. Va. 382; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Curran v. Shattuck*, 24 Cal. 427; *Stanford v. Worn*, 27 Cal. 171; *San Francisco & A. Water Co. v. Alameda Water Co.*, 36 Cal. 639; *Anderson, L., & St. L. R. Co. v. Kernodle*, 54 Ind. 314; *Gillinwater v. Miss. & A. R. Co.*, 13 Ill. 1; *Chicago v. Rock Island R. Co.*, 20 Ill. 286; *Leslie v. St. Louis*, 47 Mo. 474; *Teick v. Carver County*, 11 Minn. 292; *Lohman v. St. Paul, S., & T. F. R. Co.*, 18 Minn. 174; *New Orleans, M., & C. R. Co. v. Frederic*, 46 Miss. 1; *Nichols v. Bridgeport*, 23 Conn. 189, 208; *Spofford v. Bucksport & B. R. Co.*, 66 Me. 26; *Blaisdell v. Winthrop*, 118 Mass. 138; *Wilson v. Lynn*, 119 Mass. 174; *Derby v. Framingham & L. R. Co.*, 119 Mass. 516; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Lund v. New Bedford*, 121 Mass. 286; *White v. Nashville & N. W. R. Co.*, 7 Heisk. 518; *Whiteman v. Wilmington & S. R. Co.*, 2 Harring. (Del.) 514.

⁵ *Sherman v. Mil., L. S., & W. R. Co.*, 40 Wis. 645; *Hibbs v. Chicago & S. W. R. Co.*, 39 Iowa, 340.

⁶ *Porter v. Purdy*, 29 N. Y. 106; *Allen v. Utica, I., & E. R. Co.*, 15 Hun, 80.

A corporation which has omitted certain required steps, as the filing of a location, will be estopped to deny that it has taken the land where it has entered upon it, and begun the construction of the road.¹

Vesting of Title. — The title to land, for taking which proceedings have been commenced, vests in the company only when it has fully complied with the conditions precedent, and paid or deposited the compensation, as required by law;² and, until the title has vested by the performance of the essential conditions, the legislature may authorize an award of damages already made to be vacated, and a new one to be made.³ The company acquires its title upon performing the final award or judgment: it has then a right to enter without a deed from the owner, or any legal process;⁴ but such process is sometimes provided by statute.⁵

When Proceedings to take Land may be abandoned. — The right of the company to abandon proceedings for condemnation, without remaining liable to make compensation as for a taking, varies in different jurisdictions. The taking is the critical act which should conclude both parties; but there is not an accord in the authorities as to what is to be deemed a taking, — whether the final payment or deposit of the amount fixed, — or some earlier act or legal proceeding. The title is not, indeed, transferred until an actual payment, but the obligations of the parties may be fixed before such payment.⁶

¹ *Boston & P. R. Co. v. Midland R. Co.*, 1 Gray, 340, 361; *Drury v. Midland R. Co.*, 127 Mass. 571, 580. See *Duck River Valley N. G. R. Co. v. Cochrane*, 3 Lea (Tenn.), 478.

² *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. 9, 19; *Beekman v. Saratoga & S. R. Co.*, 3 Paige, 45, 76; *Clarkson v. Hudson River R. Co.*, 12 N. Y. 304; *Ballou v. Ballou*, 78 N. Y. 325; *Wheeler v. Rochester & S. R. Co.*, 12 Barb. 227; *Crowner v. Watertown & R. R. Co.*, 9 How. Pr. 457; *Stacey v. Vt. Cent. R. Co.*, 27 Vt. 39; *Montgomery & W. P. R. Co. v. Walton*, 14 Ala. 207; *Schuler v. Northern L. & P. T. R. Co.*, 3 Whart. 555; *Blackshire v. Atchison T. & S. R. Co.*, 13 Kan. 514; *White v. Nashville & N. W. R. Co.*, 7 Heisk. 518, 539; *Driver v. Western Union R. Co.*, 32 Wis. 569; *Carli v. Stillwater & St. P. R. Co.*, 16 Minn. 260.

³ *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395; *Garrison v. New York*, 21 Wall. 196; *Gowen v. Penobscot R. Co.*, 44 Me. 140. See *Smart v. Portsmouth & C. R. Co.*, 20 N. H. 233.

⁴ *Beekman v. Saratoga & S. R. Co.*, 3 Paige, 45, 76; *State v. Dickson*, 3 Mo. App. 464; *Indianapolis & St. L. R. Co. v. Smythe*, 45 Ind. 322; *Niagara Falls & L. O. R. Co. v. Hotchkiss*, 16 Barb. 270.

⁵ *New York Cent. & H. R. R. Co., In re*, 60 N. Y. 116, 2 Hun, 482.

⁶ *Rhinebeck & C. R. Co., In re*, 67 N. Y. 242, 8 Hun, 34; *Hudson River R. Co. v. Outwater*, 3 Sand. 689; *Visscher v. Hudson River R. Co.*, 15 Barb. 37; *First National Bank v. West River R. Co.*, 49 Vt. 167, 46 Vt. 633; *Beale v. Penn. R. Co.*, 86 Pa. St. 509; *Pinkerton v. Boston & A. R. Co.*, 109 Mass. 527; *Old Colony R. Co. v. Miller*, 125 Mass. 1.

In some jurisdictions the company may abandon at any time before payment;¹ in others, only prior to a final determination of the damages;² in others, only prior to the final fixing of the location;³ and in England the company is bound as soon as it gives the "notice to treat" a land-owner.⁴ A company cannot, after a final award of damages, abandon the proceeding and institute another with a view of obtaining an award of a less amount.⁵ It may abandon at any time illegal proceedings.⁶ The owner has been held entitled to damages where the company, in the exercise of a legal right, abandons the proceedings;⁷ and even to damages, where no possession is taken, for loss of rent or inability to put the premises to profitable use while they were liable to be taken under the pending proceedings.⁸

Mode of determining and obtaining the Compensation. — The compensation for property taken for a public use is usually ascertained, not by an action at law, but by means of a special remedy provided by statute. Some board or tribunal, called commissioners or viewers, are empowered to appraise the damages, usually with the right of appeal to a jury.

¹ *Stacey v. Vt. Cent. R. Co.*, 27 Vt. 39, 32 Vt. 551; *Gear v. Dubuque & S. C. R. Co.*, 20 Iowa, 523; *State v. Cincinnati & O. R. Co.*, 17 Ohio St. 103; *State v. Graves*, 19 Md. 351; *Blackshire v. Atchison, T., & S. F. R. Co.*, 13 Kan. 514; *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 239; *Kansas City v. Kansas P. R. Co.*, 18 Kan. 331; *St. Louis & S. E. R. Co. v. Teters*, 68 Ill. 144; *Chicago v. Barbican*, 80 Ill. 482; *North Missouri R. Co. v. Lackland*, 25 Mo. 515; *State v. Hug*, 44 Mo. 116; *Leisse v. St. Louis & I. M. R. Co.*, 2 Mo. App. 105; *Rogers v. St. Charles*, 3 Mo. App. 41. See *Baltimore v. Musgrave*, 48 Md. 272; *Feiten v. Milwaukie*, 47 Wis. 494.

² *Neal v. Pittsburg & C. R. Co.*, 31 Pa. St. 19, 2 Grant, 137; *Philadelphia v. Dyer*, 41 Pa. St. 463; *Beale v. Penn. R. Co.*, 86 Pa. St. 509; *Hudson River R. Co. v. Outwater*, 3 Sandf. 689; *Com'rs of Washington Park, In re*, 56 N. Y. 144; *Military Parade Ground, In re*, 60 N. Y. 319; *Rhinebeck & C. R. Co., In re*, 67 N. Y. 242, 8 Hun, 34; *People v. Syracuse*, 78 N. Y. 56; *Crowner v. Watertown & R. R. Co.*, 9 How. Pr. 457; *Dayton & W. R. Co. v. Marshall*, 11 Ohio St. 497.

³ *Shaw v. Charlestown*, 3 Allen, 538; *Pinkerton v. Boston & A. R. Co.*, 109 Mass. 527; *Old Colony R. Co. v. Miller*, 125 Mass. 1; *Clough v. Unity*, 18 N. H. 75; *Smart v. Portsmouth & C. R. Co.*, 20 N. H. 233; *Morris & E. R. Co. v. Blair*, 1 Stock. 635.

⁴ *Hodges's Law of Railways*, ch. iv., "The notice to treat," pp. 170-174; *Stacey v. Vt. Cent. R. Co.*, 27 Vt. 39, 47, 48; *Gear v. Dubuque & S. C. R. Co.*, 20 Iowa, 523, 528; *North Missouri R. Co. v. Lackland*, 25 Mo. 515, 528.

⁵ *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Rogers v. St. Charles City*, 3 Mo. App. 41.

⁶ *First National Bank v. West River R. Co.*, 49 Vt. 167, 46 Vt. 633.

⁷ *Gear v. Dubuque & S. C. R. Co.*, 20 Iowa, 523. The land-owner may, in some jurisdictions, resort to the special remedy to obtain compensation for a temporary dispossession, and the abandonment would reduce the damages. See *Pinkerton v. Boston & A. R. Co.*, 109 Mass. 527.

⁸ *Leisse v. St. Louis & I. M. R. Co.*, 2 Mo. App. 105; but *quære*.

The general provision in the National and State Constitutions securing the right of trial by jury in civil cases is construed not to apply to such an appraisement. It relates to the trial of issues of fact, and not to collateral questions of damages, in which no suit is pending.¹ In some States, however, the appraisement is held to be a judicial inquiry, under the Constitution, entitling a party whose property is taken to a jury.² The uniform practice in the State has been relied on in the construction of the constitutional provision.³

The mode of determining the compensation is within the discretion of the legislature;⁴ but it must be one which confides the duty of appraisement to an impartial tribunal.⁵ The company has no cause of complaint against an award, in the fact that some members of the tribunal had an interest in its favor.⁶ Where the Constitution prescribes a mode, it is not competent for the legislature to substitute another.⁷ A constitutional provision which requires a *jury* has been held in some States to require a jury of twelve persons, acting unanimously;⁸ but in New York it has been held, that the legislature may constitute a jury of a less number, and authorize it to decide by a vote less than a unanimous one.⁹ In some States the trial is not required to be

¹ *Beekman v. Saratoga & S. R. Co.*, 3 Paige, 45, 75; *Bonaparte v. Camden & A. R. Co.*, Baldwin, 205; *Whiteman v. Wilmington & S. R. Co.*, 2 Harring. 514; *Raleigh & G. R. Co. v. Davis*, 2 Dev. & B. 451, 464; *Kramer v. Cleveland & P. R. Co.*, 5 Ohio St. 140; *Louisiana & F. Plank Road Co. v. Pickett*, 25 Mo. 535; *Penn. R. Co. v. Lutheran Congregation*, 53 Pa. St. 445; *Dronberger v. Reed*, 11 Ind. 420; *Mount Washington Road Co.*, 35 N. H. 134; *Buffalo Bayou, B., & C. R. Co. v. Ferris*, 26 Texas, 588; *Houston Tap & B. R. Co. v. Milburn*, 34 Texas, 224; *Ames v. Lake Superior & M. R. Co.*, 21 Minn. 241; *Bruggerman v. True*, 25 Minn. 123. The clause in the United States Constitution does not apply to proceedings under State laws. *Lake Erie, W., & St. L. R. Co. v. Heath*, 9 Ind. 558.

² *Isom v. Miss. Cent. R. Co.*, 36 Miss. 300; *Lake Erie, W., & St. L. R. Co. v. Heath*, 9 Ind. 558; *Louisville, N. A., & St. L. A. L. R. Co. v. Dryden*, 39 Ind. 393; *Rich v. Chicago*, 59 Ill. 286; *Cook v. South Park Commissioners*, 61 Ill. 115. See

Evansville & C. R. Co. v. Miller, 30 Ind. 209, where, as the case was in equity, such a trial was held not to be required.

³ *Mount Washington Road Co., In re*, 35 N. H. 134; *Lake Erie, W., & St. L. R. Co. v. Heath*, 9 Ind. 558.

⁴ *Virginia & T. R. Co. v. Elliot*, 5 Nev. 358; *Kramer v. Cleveland & P. R. Co.*, 5 Ohio St. 140.

⁵ *Powers v. Bears*, 12 Wis. 213; *People v. Michigan Southern R. Co.*, 3 Mich. 496; *Ames v. Lake Superior & M. R. Co.*, 21 Minn. 241; *Buffalo Bayou, B., & C. R. Co. v. Ferris*, 26 Texas, 588. See *Walker v. Boston & M. R.*, 3 Cush. 1.

⁶ *Strang v. Beloit & M. R. Co.*, 16 Wis. 635.

⁷ *Rochester Water Works Co. v. Wood*, 60 Barb. 137; *House v. Rochester*, 15 Barb. 517.

⁸ *Lamb v. Lane*, 4 Ohio St. 167; *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 418.

⁹ *Cruger v. Hudson River R. Co.*, 12 N. Y. 190.

at the bar of the court, but may be before a jury sitting under the direction of the sheriff or other presiding officer.¹ The proceeding is in the nature of a suit at law, within the meaning of the national Constitution, and, if the controversy is between citizens of different States, may be removed to a national court.² The remedy should be available to the land-owner as well as to the corporation which is authorized to take his property.³

A peculiar method has sometimes been adopted by which the State takes the land and pays the compensation from funds deposited in its treasury by the company, and then leases the right of way to the corporation. When the assessed damages are not deposited, the land-owner, waiving the trespass for an entry without deposit or payment, may recover the amount in an action against the company.⁴

The proceedings for the assessment of damages, unless otherwise provided, may be instituted as well after as before the company has entered for the construction of the road.⁵ Generally, the company may apply for the assessment of an owner's damages when it has filed a map covering his land, although not having yet filed a map of the entire line.⁶

Extent and Application of the Special Remedy.—The special remedy provided by statute for the assessment of "the damages sustained by the owner of land," or "occasioned by laying out and making and maintaining the road, or by taking any land or materials," or granted in other equivalent terms, is usually construed to include not only the value of the land taken, but, also, where land is taken, the injury to the owner's remaining land, which may arise in the proper construction of the road from various causes, — as the increased difficulty of communication between the parts of the severed tract; ⁷ the inconvenient shape in

¹ G. S. Mass. ch. 43; *Fitchburg R. Co. v. Boston & M. R.*, 3 Cush. 58; *Wyman v. Eastern R. Co.*, 128 Mass. 346.

² *Boom Co. v. Patterson*, 98 U. S. 403.

³ *Shepardson v. Mil. & B. R. Co.*, 6 Wis. 605; *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215.

⁴ *Smart v. Portsmouth & C. R. Co.*, 20 N. H. 233; *Chase v. Sullivan R. Co.*, 20 N. H. 195; *Blake v. Rich*, 34 N. H. 282.

⁵ *Coster v. New Jersey R. & Trans. Co.*, 3 Zab. 227, 4 Zab. 730.

⁶ *Hunt v. Smith*, 9 Kan. 137; *Doughty v. Somerville & E. R. Co.*, 1 Zab. 442.

⁷ *Mason v. Kennebec & P. R. Co.*, 31 Me. 215; *Clark v. Boston, C., & M. R. Co.*, 24 N. H. 114; *Imlay v. Union Branch R. Co.*, 26 Conn. 249; *Robbins v. Mil. & H. R. Co.*, 6 Wis. 636; *Utica, C., & S. R. Co., In re*, 56 Barb. 456; *Somerville & E. R. Co. v. Doughty*, 2 Zab. 495; *Mifflin v.*

which the remaining land is left ;¹ the cost of new fences required in consequence of the construction of the railroad ;² the weakening of the natural support of the remaining land ;³ the withdrawal of water from springs upon it ;⁴ injury to it from the percolation of water ;⁵ the turning of streams of water on land, when necessary in the construction of the road ;⁶ the diversion of streams of water, so as to lessen the supply of a mill,⁷ or to expose a person's land to an overflow ;⁸ the exposure of land to drifts of sand from the railroad ;⁹ the throwing of stones upon it by means of blasting rocks within the location ;¹⁰ the deposit of earth and stone on the remaining land under the authority of a statute ;¹¹ and the increased exposure to fire, so far as it depreciates the value of the owner's remaining land ;¹² but injuries of a remote or speculative character, such as loss of business or custom, suffered by the owner of real estate, are not within the statute.¹³

Harrisburg, P., M., & L. R. Co., 16 Pa. St. 182.

¹ *Mifflin v. Harrisburg, P., M., & L. R. Co.*, 16 Pa. St. 182; *White v. Charlotte & S. C. R. Co.*, 6 Rich. 47.

² *Mason v. Kennebec & P. R. Co.*, 31 Me. 215; *Somerville & E. R. Co. v. Doughty*, 2 Zab. 495, 513; *Henry v. Pacific R. Co.*, 2 Iowa, 288; *Sater v. Burlington & Mt. P. R. Co.*, 1 Iowa, 386, 391; *Milwaukee & M. R. Co. v. Eble*, 4 Chandler (Wis.), 72; *North Eastern R. Co. v. Sineath*, 8 Rich. 185. The expense of one half of the cost of fencing was allowed in *Rensselaer & S. R. Co., In re*, 4 Paige, 553. See *Long Island R. Co., In re*, 3 Edw. Ch. 487.

³ *Boothby v. Androscoggin R. Co.*, 51 Me. 318.

⁴ *Aldrich v. Cheshire R. Co.*, 21 N. H. 359.

⁵ *Hoffer v. Penn. Canal Co.*, 87 Pa. St. 221.

⁶ *Curtis v. Eastern R. Co.*, 14 Allen, 55, 98 Mass. 428; *Estabrooks v. Peterborough & S. R. Co.*, 12 Cush. 224. See *Stodghill v. Chicago, B., & Q. R. Co.*, 43 Iowa, 26.

⁷ *Baltimore & O. R. Co. v. Magruder*, 34 Md. 79.

⁸ *Chesapeake & O. C. Co. v. Grove*, 11 G. & J. 398.

⁹ *Dearborn v. Boston, C., & M. R. Co.*, 24 N. H. 179.

¹⁰ *Sabin v. Vt. Cent. R. Co.*, 25 Vt.

363; *Dodge v. County Com'rs*, 3 Met. 380; *Brown v. Providence, W., & B. R. Co.*, 5 Gray, 35; *Curtis v. Eastern R. Co.*, 14 Allen, 55, 58, 98 Mass. 428; *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208. See *Hays v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *Carman v. Steubenville & I. R. Co.*, 4 Ohio St. 399.

¹¹ *East Penn. R. Co. v. Schollenberger*, 54 Pa. St. 144.

¹² *Wilmington & R. R. Co. v. Stauffer*, 60 Pa. St. 374; *Phil. & R. R. Co. v. Yeiser*, 8 Pa. St. 366; *Somerville & E. R. Co. v. Doughty*, 2 Zab. 495; *Colvill v. St. Paul & C. R. Co.*, 19 Minn. 283; *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 92, 124; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385, 392; *Utica, C., & S. V. R. Co., In re*, 56 Barb. 456. Some authorities hold such a risk to be too uncertain and contingent to be considered in an assessment. *Sunbury & E. R. Co. v. Hummell*, 27 Pa. St. 99; *Lehigh Valley R. Co. v. Lazarus*, 28 Pa. St. 203; *Patten v. Northern Cent. R. Co.*, 33 Pa. St. 426. See *Fleming v. Chicago, D., & M. R. Co.*, 34 Iowa, 353.

¹³ *Canandaigua & N. F. R. Co. v. Payne*, 16 Barb. 273; *Troy & B. R. Co. v. Northern Turnp. Co.*, 16 Barb. 100; *Troy & B. R. Co. v. Lee*, 13 Barb. 169; *Union Village & J. R. Co., In re*, 53 Barb. 457; *Utica, C., & S. V. R. Co., In re*, 56 Barb. 456; *Mount Washington Road Co., In re*, 35 N. H. 134; *Proprietors of Locks & Canals*

The special remedy extends to all acts which the company is authorized to do, and for which it is made liable, including such consequential injuries as it is required to compensate.¹ It is the exclusive remedy, not only for the owner of the fee, but for all parties having interests entitling them to compensation.² It may include injuries from excavations and erections within the location to adjoining land outside;³ the value of materials taken under the statute outside of the location;⁴ and injuries occasioned to land not within the location, and not a part of any tract lying within it.⁵ But some statutes are of a more limited scope, and confine the remedy to cases where land or materials are taken.⁶ A statute of New Hampshire, which was construed with reference to acts relating to the assessment of damages to the owners of land required for highways, was held not to extend to injuries to persons whose land was not included in the location of the railroad. Accordingly, a land-owner, owning land outside of the location which had been flooded in consequence of the company's works within it, was held not entitled to the special remedy; but, as his constitutional right had been invaded, without any remedy being given by statute, he was allowed to maintain his action at common law.⁷

The special remedy is appropriate to the taking of, or an injury to, the franchise of a bridge or turnpike corporation.⁸ It may

v. Nashua & L. R. Co., 10 Cush. 385; *Boston & W. R. Co. v. Old Colony R. Co.*, 12 Cush. 605; *Sunbury & E. R. Co. v. Hummell*, 27 Pa. St. 99; *Searle v. Lackawanna & B. R. Co.*, 33 Pa. St. 57; *Fleming v. Chicago, D., & M. R. Co.*, 34 Iowa, 353; *Robbins v. Milwaukee & H. R. Co.*, 6 Wis. 636.

¹ *Ellsworth v. Central R. Co.*, 5 Vroom, 93; *Henniker v. Contoocook Valley R. Co.*, 29 N. H. 146; *Colcough v. Nashville & N. R. Co.*, 2 Head, 171; *Vaughan v. Taff Vale R. Co.*, 5 H. & N. 670; *Brand v. Hammersmith & C. R. Co.*, L. R. 2 Q. B. 223; *Slatten v. Des Moines Valley R. Co.*, 29 Iowa, 148; *Chicago & A. R. Co. v. Springfield & N. R. Co.*, 67 Ill. 142.

² *Colcough v. Nashville & N. R. Co.*, 2 Head, 171.

³ *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294; *Dearborn v. Boston, C., & M. R. Co.*, 24 N. H. 179.

⁴ *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365; *White Water Valley R. Co. v. McClure*, 29 Ind. 536; *Baker v. Hannibal & St. J. R. Co.*, 36 Mo. 543.

⁵ *Dodge v. County Com'rs*, 3 Met. 380; *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365; *Sabin v. Vt. Cent. R. Co.*, 25 Vt. 363; *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208.

⁶ *Rogers v. Kennebec & P. R. Co.*, 35 Me. 319; *Whittier v. Portland & K. R. Co.*, 38 Me. 26; *Eaton v. B., C., & M. R.*, 51 N. H. 504; *Thompson v. Androscoggin R. I. Co.*, 54 N. H. 545, 58 N. H. 108; *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117.

⁷ *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504; *Clark v. Saybrook*, 21 Conn. 313.

⁸ *White River Turnp. Co. v. Vt. Cent. R. Co.*, 21 Vt. 590; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 454.

also be availed of by the State for obtaining damages to property held by it, as a body corporate, where, under the same circumstances, a citizen's right to compensation would be within it.¹ The State may, however, grant to the company the right to take its own property without requiring compensation.²

The Statute Remedy exclusive.—The special remedy provided by statute for determining the compensation for property taken is exclusive. One who is acting under lawful authority cannot be made liable as a wrong-doer for his acts and their necessary consequences; and where a special remedy conforming to the Constitution is provided by statute under which the owner may obtain compensation, he is confined to such remedy, and cannot maintain an action at common law. The special remedy usually applies to all injuries for which the company, acting under legislative authority, is liable, whether they are actionable at common law or only remediable by reason of the statute. The final award is a bar to an action for any injury which the appraisers could have legally estimated, irrespective of their action upon the claim for injury, or even their knowledge or ignorance of its existence. They are conclusively presumed to have performed their duty, except in a direct proceeding to set aside the award, or on appeal.³

¹ *Commonwealth v. Boston & M. R.*, 3 Cush. 25.

² *Indiana Cent. R. Co. v. State*, 3 Ind. 421.

³ *Stowell v. Flagg*, 11 Mass. 364; *Stevens v. Middlesex Canal*, 12 Mass. 466; *Dodge v. County Com'rs*, 3 Met. 380; *Mellen v. Western R. Co.*, 4 Gray, 301; *Perry v. Worcester*, 6 Gray, 544; *Mason v. Kennebec & P. R. Co.*, 31 Me. 215; *Gowen v. Penobscot R. Co.*, 44 Me. 140; *Boothby v. Androscoggin & K. R. Co.*, 51 Me. 318; *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365; *Sabin v. Vt. Cent. R. Co.*, 25 Vt. 368; *Woods v. Nashua Man. Co.*, 4 N. H. 527; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359; *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Clark v. Boston, C., & M. R. Co.*, 24 N. H. 111; *Dearborn v. Boston, C., & M. R. Co.*, 24 N. H. 179; *Henniker v. Contoocook Valley R. Co.*, 29 N. H. 146; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504; *Orr v. Quimby*, 54 N. H. 590; *Perley v. Boston,*

C., & M. R. Co., 57 N. H. 212; *Furness v. Hudson River R. Co.*, 5 Sandf. 551; *Calking v. Baldwin*, 4 Wend. 667; *Selden v. Delaware & H. Canal Co.*, 29 N. Y. 634, 24 Barb. 362; *Phil. & R. R. Co. v. Yeiser*, 8 Pa. St. 366; *McKinney v. Monongahela Nav. Co.*, 14 Pa. St. 65; *Phil. W., & B. R. Co. v. Williams*, 54 Pa. St. 103; *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. St. 23; *Koch v. Williamsport Water Co.*, 65 Pa. St. 288; *Fehr v. Schuylkill Nav. Co.*, 69 Pa. St. 161; *Chesapeake & O. C. Co. v. Grove*, 11 Gill & J. 398; *Baltimore & P. R. Co. v. Magruder*, 34 Md. 79; *Winchester & P. R. Co. v. Washington*, 1 Rob. (Va.) 67; *Hueston v. Eaton & H. R. Co.*, 4 Ohio St. 685; *Little Miami R. Co. v. Whiteacre*, 8 Ohio St. 590; *Null v. Whitewater V. Canal Co.*, 4 Ind. 431; *Lafayette & I. R. Co. v. Smith*, 6 Ind. 249; *New Albany & S. R. Co. v. Connelly*, 7 Ind. 32, 35; *Levison v. Junction R. Co.*, 7 Ind. 597; *McCormack v. Terre Haute & R. R. Co.*, 9 Ind.

The special remedy is exclusive as to both parties where each may resort to it. If either may be the actor, neither can complain that the other did not first proceed under it. The owner cannot, therefore, maintain an action at common law, where he fails to resort to the remedy provided for him by the statute.¹ But if the company alone has the power, or is under a special obligation, to carry it into effect, and is in default for not having done so within a reasonable time, the injured owner is not deprived of his remedy by action.²

Generally, where the State Constitution is construed to require a payment of the compensation to precede an entry for construction, the company is held to be under a prior obligation to initiate the proceedings for an assessment, and if it enters without doing so, it is a trespasser.³ But if the owner waives the condition precedent, he will be confined to the statute remedy.⁴

283; *Lafayette Plank Road Co. v. New Albany & S. R. Co.*, 13 Ind. 90; *Indiana Cent. R. Co. v. Oakes*, 20 Ind. 9; *Green v. Boody*, 21 Ind. 10; *Pettibone v. La Crosse & M. R. Co.*, 14 Wis. 443; *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609; *Kennedy v. Mil. & St. P. R. Co.*, 22 Wis. 581; *Sherman v. Mil., L. S., & W. R. Co.*, 40 Wis. 645; *Cairo & F. R. Co. v. Turner*, 31 Ark. 494; *McIntire v. Western N. C. R. Co.*, 67 N. C. 278; *Brown v. Beatty*, 84 Miss. 227; *McLaughlin v. Charlotte & S. C. R. Co.*, 5 Rich. 583; *Fuller v. Edings*, 11 Rich. 239; *Colcough v. Nashville & N. R. Co.*, 2 Head, 171; *Tenn. & A. R. Co. v. Adams*, 3 Head, 596; *Daniels v. Chicago & N. W. R. Co.*, 35 Iowa, 129; *Stodghill v. Chicago, B., & Q. R. Co.*, 43 Iowa, 26; *Clark v. Hannibal & St. J. R. Co.*, 36 Mo. 202; *Lindell v. Hannibal & St. J. R. Co.*, 36 Mo. 543; *Teick v. Carver County*, 11 Minn. 292; *Great Laxe Mining Co. v. Clague*, L. R. 4 App. Cas. 115; *Little v. Dublin & D. R. Co.*, 7 Ir. C. L. 82. In Georgia, the special remedy is held not to be exclusive. *Carr v. Georgia R. Co.*, 1 Ga. 524. See *Crittenden v. Wilson*, 5 Cowen, 165.

¹ *Calving v. Baldwin*, 4 Wend. 667; *Selden v. Delaware & H. Canal Co.*, 29 N. Y. 634, 641, 24 Barb. 362; *Orr v. Quimby*, 54 N. H. 590, 602; *Koch v. Williamsport Water Co.*, 65 Pa. St. 288; *McIntire v. Western N. C. R. Co.*, 67

N. C. 278; *Cairo & F. R. Co. v. Turner*, 31 Ark. 230; *Daniels v. Chicago & N. W. R. Co.*, 35 Iowa, 129; *Lindell v. Hannibal & St. J. R. Co.*, 36 Mo. 543; *Soulard v. St. Louis*, 36 Mo. 546; *Atlanta & G. R. Co. v. Fuller*, 48 Ga. 423. See *Hooker v. New Haven & N. Co.*, 15 Conn. 312, 14 Conn. 146.

² *Pettibone v. La Crosse & M. R. Co.*, 14 Wis. 443; *Loop v. Chamberlain*, 20 Wis. 135; *Bohlman v. Green Bay & L. P. R. Co.*, 30 Wis. 105; *Sherman v. Mil., L., & W. R. R. Co.*, 40 Wis. 645; *Blesch v. Chicago & N. W. R. Co.*, 43 Wis. 183; *Stein v. Burden*, 24 Ala. 130; *Kansas Pacific R. Co. v. Streeter*, 8 Kan. 133; *Eward v. Lawrenceburgh & U. M. R. Co.*, 7 Ind. 711; *Cushman v. Smith*, 34 Me. 247; *Hall v. Pickering*, 40 Me. 548; *Nichols v. Somerset & K. R. Co.*, 43 Me. 356; *Gowen v. Penobscot R. Co.*, 44 Me. 140; *Davis v. Russell*, 47 Me. 443. See *Bradley v. York & N. H. R. Co.*, 21 Conn. 294; *Nicholson v. New York & N. H. R. Co.*, 22 Conn. 74; *Cairo & F. R. Co. v. Trout*, 32 Ark. 17.

³ *Graham v. Columbus & I. C. R. Co.*, 27 Ind. 260; *Cox v. Louisville, N. A., & C. R. Co.*, 48 Ind. 178; *Memphis & C. R. Co. v. Payne*, 37 Miss. 700; *Missouri River, F. S., & G. R. Co. v. Owen*, 8 Kan. 409.

⁴ *Sherman v. Milwaukee, L. S., & W. R. Co.*, 40 Wis. 645.

The legislature may, subsequent to the taking, allow the owner a further remedy where neither party has applied for an assessment.¹

Acts of Trespass or Negligence not within the Special Remedy.²

The special remedy does not extend to acts of trespass committed by the company before its possession became lawful, or at other times.³ Their inclusion in the assessment does not bar a right of action,⁴ which belongs to the person who was the owner when they were committed.⁵ In a proceeding for condemnation, the amount recovered by the land-owner for an unlawful entry made by the company before the proceedings were commenced are not to be deducted from the damages to which he is entitled for the taking.⁶

The appraisers are to presume that the company will execute its work properly, and not exceed its powers; and they cannot award damages on the supposition that it will be guilty of a breach of duty. They are to assess the damages for those acts only which are authorized by statute. Therefore the special proceeding will not bar the remedy at common law where the company exceeds its authority, or negligently or unskilfully performs its work, so as to occasion unnecessary damage.⁷ This rule applies,

¹ *Gowen v. Penobscot R. Co.*, 44 Me. 140. See *ante*, p. 171.

² Some points stated in this connection recur later, where the liability at common law for torts is treated. Chap. X. p. 236.

³ *Blodgett v. Utica & B. R. R. Co.*, 64 Barb. 580; *Townsend's Case*, 39 N. Y. 171; *McClinton v. Pittsburg, Ft. W., & C. R. Co.*, 66 Pa. St. 404; *Missouri, K., & T. R. Co. v. Ward*, 10 Kan. 352; *Proetz v. St. Paul Water Co.*, 17 Minn. 163; *Matthews v. St. Paul & S. C. R. Co.*, 18 Minn. 434; *Selma, R., & D. R. Co. v. Keith*, 53 Ga. 178; *Oregon & C. R. Co. v. Barlow*, 3 Oreg. 311. See *Pomeroy v. Chicago & M. R. Co.*, 25 Wis. 641.

⁴ *Pierce v. Worcester & N. R. Co.*, 105 Mass. 199. See *Clark v. Vt. & C. R. Co.*, 28 Vt. 103.

⁵ *Central R. Co. v. Hetfield*, 5 Dutcher, 206; *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215.

⁶ *Lafayette, M., & B. R. Co. v. Murdock*, 68 Ind. 137.

⁷ *Mason v. Kennebec & P. R. Co.*, 31 Me. 215; *Rogers v. Kennebec & P. R. Co.*, 35 Me. 215; *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208; *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365; *Hatch v. Vt. Cent. R. Co.*, 25 Vt. 49, 63, 28 Vt. 142; *Sabin v. Vt. Cent. R. Co.*, 25 Vt. 363; *Whitcomb v. Vt. Cent. R. Co.*, 25 Vt. 69; *Clark v. Vt. & C. R. Co.*, 28 Vt. 103; *Waterman v. Conn. & P. R. R. Co.*, 30 Vt. 610; *Dearborn v. Boston, C., & M. R. Co.*, 24 N. H. 179, 187; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504, 515; *Perley v. Boston, C., & M. R. Co.*, 57 N. H. 212; *Dodge v. County Com'rs*, 3 Met. 380, 383; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Hazen v. Boston & M. R.*, 2 Gray, 574; *Mellen v. Western R. Co.*, 4 Gray, 301; *Hooker v. New Haven & N. Co.*, 15 Conn. 312, 14 Conn. 146; *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 486; *Bellinger v. New York Cent. R. Co.*, 28 N. Y. 42; *Schuylkill Nav. Co. v. McDonough*, 33 Pa. St. 73; *Pittsburg, Ft. W., & C. R. Co.*

although the faulty construction precedes the assessment.¹ An action will lie for injuries arising from a negligent or unskilful construction, where the owner has conveyed a right of way or executed a release of damages.²

Description of Property and Injury.—The description in the pleadings, the report of the commissioners, and the location filed, must be given with sufficient certainty, so as to leave no practical question as to the identity of the property taken.³ Omissions and ambiguities in the written description may be cured by a plan or map, to which reference is made; ⁴ or by possession taken by the company and acquiesced in by the land-owner.⁵ A petition for the appraisal of damages need not describe in detail the extent of the injury, or the precise mode in which it occurred; but it is sufficient to state in general terms that certain de-

v. Gilleland, 56 Pa. St. 445; Penn. & O. Canal Co. *v.* Graham, 63 Pa. St. 290; *Fehr v. Schuylkill Nav. Co.*, 69 Pa. St. 161; *Baltimore & O. R. Co. v. Reaney*, 42 Md. 117, 130; *Crawfordsville R. Co. v. Wright*, 5 Ind. 252; *Lafayette Plank Road Co. v. New Albany & S. R. Co.*, 13 Ind. 90; *Terre Haute & I. R. Co. v. McKinley*, 33 Ind. 274; *Fleming v. Chicago, D., & M. R. Co.*, 34 Iowa, 353; *King v. Iowa Midland R. Co.*, 34 Iowa, 458; *Daniels v. Chicago & N. W. R. Co.*, 35 Iowa, 129; *Gear v. C. C. & D. R. Co.*, 43 Iowa, 83, 39 Iowa, 23; *Rau v. Minn. Valley R. Co.*, 13 Minn. 442; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538; *McCormick v. Kansas City, St. J., & C. B. R. Co.*, 57 Mo. 433; *Oregon & C. R. Co. v. Barlow*, 3 Oreg. 311; *Winchester & P. R. Co. v. Washington*, 1 Rob. (Va.) 67; *Southside R. Co. v. Daniel*, 20 Gratt. 344; *Colcough v. Nashville & N. R. Co.*, 2 Head, 171; *Eyre's Case*, 3 Nev. & M. 622; *Lawrence v. Great Northern R. Co.*, 16 Q. B. n. s. 643; *Turner v. Sheffield & R. R. Co.*, 10 M. & W. 425; *Davis v. London & B. R. Co.*, 1 M. & G. 799; *Vaughan v. Taff Vale R. Co.*, 5 H. & N. 679; *Brand v. Hammersmith & C. R. Co.*, L. R. 2 Q. B. 223, L. R. 4 H. L. 171.

¹ *King v. Iowa Midland R. Co.*, 34 Iowa, 458.

² *Spencer v. Hartford, P., & F. R. Co.*, 10 R. I. 14. See *ante*, Chap. VI. p. 134.

³ *O'Hara v. Penn. R. Co.*, 25 Pa. St.

445; *Zack v. Penn. R. Co.*, 25 Pa. St. 394; *Penn. R. Co. v. Porter*, 29 Pa. St. 165; *Penn. R. Co. v. Bruner*, 55 Pa. St. 318; *Vail v. Morris & E. R. Co.*, 1 Zab. 189; *Doughty v. Somerville & E. R. Co.*, 1 Zab. 442; *Coster v. New Jersey, R., & T. Co.*, 3 Zab. 227; *Walker v. Boston & M. R.*, 3 Cush. 1, 15; *Grand Junction R. & D. Co. v. County Com'rs*, 14 Gray, 553; *New York Cent. & H. R. R. Co., In re*, 70 N. Y. 191; *Marion & M. V. R. Co. v. Ward*, 9 Ind. 123; *Prather v. Jeffersonville, M., & I. R. Co.*, 52 Ind. 16, 40; *Anderson, L., & St. L. R. Co. v. Kernodle*, 54 Ind. 314; *Central R. Co. v. Merkel*, 32 Tex. 723. See *post*, THE LOCATION, p. 256. The petition may be amended. *Penn. R. Co. v. Porter*, 29 Pa. St. 165; *Grand Junction R. & D. Co. v. County Com'rs*, 14 Gray, 553.

⁴ *Hazen v. Boston & M. R.*, 2 Gray, 574; *Andover v. County Com'rs*, 5 Gray, 393; *Grand Junction, R., & D. Co. v. County Com'rs*, 14 Gray, 553; *Pinkerton v. Boston & A. R. Co.*, 109 Mass. 527; *Wilson v. Lynn*, 119 Mass. 174; *Kohlhepp v. West Roxbury*, 120 Mass. 596; *Strang v. Beloit & M. R. Co.*, 16 Wis. 635; *Hunt v. Smith*, 9 Kan. 137; *Quincy, M., & P. R. Co. v. Kellogg*, 64 Mo. 334. *Aliter* as to a reference to a deed. *New York Cent. & H. R. R. Co., In re*, 70 N. Y. 191.

⁵ *Drury v. Midland R. Co.*, 127 Mass. 571, 580.

scribed property has been appropriated under the statute.¹ Under a petition which prays for compensation for the taking, damages may be awarded for the injury to the petitioner's remaining land.² The jury is not required to state the items of damage in their verdict.³

Averment and Proof of Inability to agree. — A statute provision, giving a special remedy if the parties are unable to agree as to the amount of compensation, has been held by many authorities to make an effort to agree a condition precedent to an application for an assessment, and to require an averment and proof of the inability to agree, as essential to jurisdiction;⁴ and a similar effect is given to a provision which authorizes a condemnation, where the parties are unable to agree as to the necessity of the taking, and the extent of land to be taken.⁵ Another and more reasonable view is that such reference to the agreement of the parties is a mere recognition of their right to fix the amount of compensation, and to convey and receive a title without the intervention of judicial proceedings, and that the failure to agree is not a fact which need be alleged or proved in order to give jurisdiction.⁶ The requirement is satisfied by proof of any circumstances showing that the parties could not agree as to the amount of the price or damages; and formal negotiations need not be shown.⁷ Even the commencement of proceedings for de-

¹ *Pinkerton v. Boston & M. R.*, 109 Mass. 527; *Drury v. Midland R. Co.*, 127 Mass. 571; *Grand Junction R. & D. Co. v. County Com'rs*, 14 Gray, 553.

² *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 544.

³ *Delaware, L., & W. R. Co. v. Burson*, 61 Pa. St. 369.

⁴ *Vail v. Morris & E. R. Co.*, 1 Zab. 189; *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100; *O'Hara v. Penn. R. Co.*, 25 Pa. St. 445; *Penn. R. Co. v. Porter*, 29 Pa. St. 165; *Darlington v. United States*, 82 Pa. St. 382; *Dyckman v. New York*, 5 N. Y. 434; *Prospect Park & C. I. R. Co.*, *In re*, 67 N. Y. 371; *Marsh's Case*, 71 N. Y. 315; *Lockport & B. R. Co.*, *In re*, 77 N. Y. 557; *Chicago, B., & Q. R. Co. v. Chamberlain*, 84 Ill. 333; *Powers v. Hazelton & L. R. Co.*, 33 Ohio St. 429; *Leslie v. St. Louis*, 47 Mo. 474; *Hannibal & St. J. R.*

Co. v. Muder, 49 Mo. 165; *Ells v. Pacific R. Co.*, 51 Mo. 200; *Jamison v. Springfield*, 53 Mo. 224; *Kansas City, St. J., & C. B. R. Co. v. Campbell*, 62 Mo. 585; *Rogers v. St. Charles*, 3 Mo. App. 41; *Gilmer v. Lime Point*, 19 Cal. 47; *Contra Costa C. M. R. Co. v. Moss*, 23 Cal. 323; *Lincoln v. Colusa Co.*, 28 Cal. 662; *San Francisco & A. W. Co. v. Alameda Water Co.*, 36 Cal. 639. See *Miller v. Brown*, 56 N. Y. 383.

⁵ *Spofford v. Bucksport & B. R. Co.*, 66 Me. 26.

⁶ *Bigelow v. Miss. Cent. & T. R. Co.*, 2 Head, 624. See *Coster v. New Jersey R. & T. Co.*, 3 Zab. 227.

⁷ *Prospect Park & C. I. R. Co.*, *In re*, 67 N. Y. 371; *Williams v. Hartford & N. H. R. Co.*, 13 Conn. 397; *Trinity College v. Hartford*, 32 Conn. 452; *Todd v. Austin*, 34 Conn. 78; *West Virginia Trans. Co. v. Volcanic O. & C. Co.*, 5 W. Va.

termining the compensation has been held sufficient to signify an election not to agree.¹ The failure to agree may be shown by affidavit;² and it need not be shown by affirmative proof where the allegation is made in the petition and not put in issue by the answer or at the trial.³ The omission in the petition of the allegation of a failure to agree may be cured by amendment.⁴ Where the inability to agree appears of record, it cannot be contested in a collateral proceeding.⁵ The omission of an attempt to agree may be waived by the parties.⁶ The statute requirement does not apply where the persons whose land or interests are taken are, by reason of nonage or other disability, incapable of making a voluntary conveyance.⁷

Notice to Land-owners. — Under the usual constitutional provision, parties are not entitled to notice of a hearing upon the question of the necessity and expediency of appropriating their property to a public use, though such notice is sometimes required by statute.⁸ Notice of the application for the appointment of appraisers, and of the time and place of their meeting, to assess the damages, is usually directed by statute, and, upon general principles of justice, ought to be ordered in the absence of any statute requirement.⁹ The denial of all opportunity to be heard on the right to, and amount of, compensation would be depriving the citizen of his property without "due process of law."¹⁰

382; *Columbia & D. Bridge Co. v. Geise*, 5 Vroom, 268, 6 Vroom, 558; *Doughty v. Somerville & E. R. Co.*, 1 Zab. 442.

¹ *Burt v. Brigham*, 117 Mass. 307; *Wadhams v. Lackawanna & B. R. Co.*, 42 Pa. St. 303. But see *Lincoln v. Colusa Co.*, 28 Cal. 662.

² *Tucker v. Erie & N. E. R. Co.*, 27 Pa. St. 281.

³ *Boston, H. T., & W. R. Co., In re*, 79 N. Y. 64.

⁴ *Penn. R. Co. v. Porter*, 29 Pa. St. 165.

⁵ *Dyckman v. New York*, 5 N. Y. 434; *Miss. & M. R. Co. v. Rosseau*, 8 Iowa, 373; *Wadhams v. Lackawanna & B. R. Co.*, 42 Pa. St. 303; *Ney v. Swinney*, 36 Ind. 454. *Contra*, *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 418.

⁶ *United States v. Reed*, 56 Mo. 565.

⁷ *Indiana Cent. R. Co. v. Oakes*, 20 Ind. 9; *Balch v. County Com'rs*, 103 Mass. 106.

⁸ *People v. Smith*, 21 N. Y. 595; *New York Elevated R. Co.*, 70 N. Y. 327; *Long Island R. Co. v. Bennett*, 10 Hun, 91; *Johnson v. Joliet & C. R. Co.*, 23 Ill. 202; *Swan v. Williams*, 2 Mich. 427; *Harper v. Lexington & O. R. Co.*, 2 Dana, 227; *George's Creek Coal & I. Co. v. New Central Coal Co.*, 40 Md. 425; *Zack v. Penn. R. Co.*, 25 Pa. St. 394. See *Seifert v. Brooks*, 34 Wis. 443; *ante*, pp. 146, 147.

⁹ *Curran v. Shattuck*, 24 Cal. 427; *People v. Tallman*, 36 Barb. 222; *Polly v. Saratoga & W. R. Co.*, 9 Barb. 449; *Dickey v. Tennison*, 27 Mo. 373; *Missouri River, F. S., & G. R. Co. v. Shepard*, 9 Kan. 647; *Whitcher v. Benton*, 48 N. H. 157.

¹⁰ *Stuart v. Palmer*, 74 N. Y. 183. See *Johnson v. Joliet & C. R. Co.*, 23 Ill. 202.

The proceeding is *in rem*, against the land itself, and the kind of notice is within the discretion of the legislature: it may be constructive, to wit, by publication, as well as personal.¹ The duty to give notice may be implied from the provisions of a statute, when not expressly enjoined.² The proceedings are invalid if the notice required by statute is not given.³ The omission may, however, be waived by an appearance, and contesting the proceedings on the merits, but not merely by appearing and objecting to their regularity.⁴ Where jurisdiction has been acquired, it will not be taken away by a failure to give the notice.⁵ An act authorizing the taking of property is not unconstitutional for the reason that it does not require a notice, and the court may order one to be given.⁶ The notice must conform to the statute, but, when the form or mode is not prescribed, it should be such as to apprise the owner of the proceedings to be instituted, and the property to be taken.⁷

Joinder of Parties. — Parties having joint or several, legal or equitable, interests in the same estate are usually, by practice

¹ *Cupp v. Seneca County*, 19 Ohio St. 173; *New Orleans, J., & G. N. R. Co. v. Hemphill*, 35 Miss. 17; *Owners of Ground v. Albany*, 15 Wend. 374; *Empire City Bank, In re*, 18 N. Y. 199; *Stuart v. Palmer*, 74 N. Y. 183; *Mason v. Messenger*, 17 Iowa, 261; *Missouri River, F. S., & G. R. Co. v. Shepard*, 9 Kan. 647; *Wilkin v. St. Paul & P. R. Co.*, 16 Minn. 271; *Weir v. St. Paul, S., & T. F. R. Co.*, 18 Minn. 155. See *Walker v. Boston & M. R.*, 3 Cush. 1; *Salem v. Eastern R. Co.*, 98 Mass. 431, 448.

² *Atlantic & St. L. R. R. Co. v. Cumberland County Com'rs*, 51 Me. 36.

³ *People v. Kniskern*, 54 N. Y. 52; *People v. Lockport & B. R. Co.*, 13 Hun, 211; *Norton v. Wallkill Valley R. Co.*, 63 Barb. 77; *Hood v. Finch*, 8 Wis. 381; *Anderson v. Com'rs*, 12 Ohio St. 635; *New Orleans, M., & C. R. Co. v. Frederic*, 46 Miss. 1; *Morgan v. Chicago & N. E. R. Co.*, 36 Mich. 428; *Chicago & A. R. Co. v. Smith*, 78 Ill. 96; *Warwick Institution v. Providence*, 12 R. I. 144. An injunction will not be granted to restrain the company on account of the omission of notice without allowing an opportunity to give one. *Lohman v. St. Paul, S., & T. F. R. Co.*, 18 Minn. 174.

⁴ *Mohawk & H. R. R. Co. v. Art-*

cher, 6 Paige, 83; *Dyckman v. New York*, 5 N. Y. 434; *Cruger v. Hudson River R. Co.*, 12 N. Y. 190; *Long Island R. Co. v. Bennett*, 10 Hun, 91; *Walker v. Boston & M. R.*, 3 Cush. 1; *Concord R. Co. v. Greely*, 17 N. H. 47; *Boston & M. R. v. Folsom*, 46 N. H. 64; *Roberts v. Stark*, 47 N. H. 223; *Kramer v. Cleveland & P. R. Co.*, 5 Ohio St. 140; *Quincy, M., & P. R. Co. v. Kellogg*, 54 Mo. 334; *Spurrier v. Wirtner*, 48 Iowa, 486; *Seifert v. Brooks*, 34 Wis. 443. See *Atlantic & St. L. R. Co. v. Cumberland County Com'rs*, 51 Me. 36.

⁵ *Allen v. Utica, I., & E. R. Co.*, 15 Hun, 80.

⁶ *Swan v. Williams*, 2 Mich. 427.

⁷ *Van Wickle v. Camden & A. R. & T. Co.*, 2 Green (N. J.), 162; *Doughty v. Somerville & E. R. Co.*, 1 Zab. 442, 447; *Vail v. Morris & E. R. Co.*, 1 Zab. 189; *Coster v. New Jersey R. Co.*, 3 Zab. 227, 232, 233, 4 Zab. 730, 733; *Reitenbaugh v. Chester Valley R. Co.*, 21 Pa. St. 100; *Williams v. Hartford & N. H. R. Co.*, 13 Conn. 397; *Quincy & P. R. Co. v. Taylor*, 43 Mo. 35; *Quincy, M., & P. R. Co. v. Kellogg*, 54 Mo. 334; *Chicago & A. R. Co. v. Smith*, 78 Ill. 96; *New York Elevated R. Co., In re*, 70 N. Y. 327.

or by statute, allowed, and sometimes are required, to join in a proceeding for determining the compensation; and the statute usually provides a mode for apportioning the total amount among them, according to the value of their respective interests.¹ The following are instances of such joinder: the vendor and the vendee under a written contract of sale;² a widow with a right of dower and the heirs;³ a lessor and a lessee;⁴ a life tenant and the owner of the remainder in fee;⁵ partners owning real estate as a firm, although the legal title may be in only one of them.⁶ One tenant in common cannot recover in his own name damages for injury to the interest of his co-tenants.⁷ A person having an interest in the estate which does not entitle him to compensation need not be joined.⁸ Where different claimants join in a petition for the assessment of damages, the jury may find the damages as an entirety.⁹

Under a statute of Ohio, the owners of different parcels may be joined, each owner being entitled to a separate trial, and persons having different interests in the same parcel may be joined.¹⁰ A statute of Massachusetts requires an estate in which there are different interests to be valued as one estate, in like manner as if owned by one person in fee-simple, and provides that the entire sum so awarded be apportioned among the owners of the different estates. By this method the total amount of compensation is the same, whether there is a unity or subdivision of interests.¹¹

¹ *Grand Rapids, N., & L. S. R. Co. v. Alley*, 34 Mich. 16; *East Saginaw & St. C. R. Co. v. Benham*, 28 Mich. 459; *Southern Pacific R. Co. v. Wilson*, 49 Cal. 396.

² *Ashby v. Eastern R. Co.*, 5 Met. 368; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Pinkerton v. Boston & A. R. Co.*, 109 Mass. 527; *Drury v. Midland R. Co.*, 127 Mass. 571, 578; *Colcough v. Nashville & N. R. Co.*, 2 Head, 171.

³ *Columbia & D. Bridge Co. v. Geise*, 5 Vroom, 268, 6 Vroom, 558.

⁴ *Kohl v. United States*, 91 U. S. 367.

⁵ *Pittsburg, V., & C. R. Co. v. Bentley*, 88 Pa. St. 178. See *Reading R. Co. v. Boyer*, 13 Pa. St. 497.

⁶ *Whitman v. Boston & M. R.*, 3 Allen, 133; *Reed v. Hanover Branch R. Co.*,

105 Mass. 303; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 127.

⁷ *Harrisburg, P. M., & L. R. Co. v. Bucher*, 7 Watts, 33.

⁸ *Davidson v. Boston & M. R.*, 3 Cush. 91.

⁹ *East Saginaw & St. C. R. Co. v. Benham*, 28 Mich. 459; *Michigan A. L. R. Co. v. Barnes*, 6 North West. Rep. 651.

¹⁰ *Giesy v. Cincinnati, W., & Z. R. Co.*, 4 Ohio St. 308; *Kohl v. United States*, 91 U. S. 367.

¹¹ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Edmands v. Boston*, 108 Mass. 535. See *Chicago, B., & Q. R. Co. v. Chamberlain*, 84 Ill. 333; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *Ross v. Elizabethtown & S. R. Co.*, *Spencer (N. J.)*, 230. An award cannot aggregate in

Persons entitled to Compensation. — The right to the compensation accrues and takes effect at the time of the taking, though it may be ascertained and declared afterwards. It belongs, therefore, to the person who is the owner at the time of the taking, and does not, without an express stipulation, pass to a purchaser by a subsequent conveyance, although containing covenants of warranty.¹ The waiver of such owner will bind parties claiming under him.² The owner of an equitable interest may, but need not, be joined.³ The right to compensation for land taken but not paid for during the lifetime of an owner, survives to the executor or administrator; ⁴ but if land belonging to the estate of an intestate person is taken, the heir is entitled to the compensation.⁵ The owner's right is not affected by changes in the proprietorship of the railroad.⁶

Statutes which provide a remedy to owners of land taken are construed to include all persons who have proprietary interests capable of being taken, whether in possession, reversion, or remainder, as owners of rights of way or other easements,⁷ mortgagees,⁸ married women in case of injury to their separate estate,⁹ and owners of franchises issuing out of land; ¹⁰ but they do not include a judgment creditor,¹¹ or a trespasser in possession.¹² The

one sum the value of lands owned severally by different owners. *Chicago & M. L. S. R. Co. v. Sanford*, 23 Mich. 418.

¹ *Drury v. Midland R. Co.*, 127 Mass. 571, 578; *Rand v. Townshend*, 26 Vt. 670; *Lewis v. Wilmington & M. R. Co.*, 11 Rich. 91; *Pomeroy v. Chicago & M. R. Co.*, 25 Wis. 641; *Central R. Co. v. Merkel*, 32 Tex. 723; *McLendon v. West Point & A. R. Co.*, 54 Ga. 293; *Carli v. Stillwater & St. P. R. Co.*, 16 Minn. 260; *Trogden v. Winona & St. P. R. Co.*, 22 Minn. 198; *Chicago & A. R. Co. v. Maher*, 91 Ill. 312; *McFadden v. Johnson*, 72 Pa. St. 335; *Tenbrooke v. Jahke*, 77 Pa. St. 392; *Allyn v. Providence, W., & B. R. Co.*, 4 R. I. 457; *Paducah & M. R. Co. v. Stovall*, 12 Heisk. 1. Such owner only can object to a location on the ground of damage to his property. *Hentz v. Long Island R. Co.*, 13 Barb. 646.

² *Illinois Cent. R. Co. v. Allen*, 39 Ill. 205; *Toledo, W., & W. R. Co. v. Morgan*, 72 Ill. 155; *Central R. Co. v. Hetfield*, 5 Dutcher, 206.

³ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385;

Drury v. Midland R. Co., 127 Mass. 571, 578.

⁴ *Moore v. Boston*, 8 Cush. 274; *Hotchkiss v. Auburn & R. R. Co.*, 36 Barb. 600.

⁵ *Boytton v. Peterborough & S. R. Co.*, 4 Cush. 467; *Neal v. Knox & L. R. Co.*, 61 Me. 298; *Ballou v. Ballou*, 78 N. Y. 325.

⁶ *Western Penn. R. Co. v. Johnston*, 59 Pa. St. 290; *Drury v. Midland R. Co.*, 127 Mass. 571; *Gilman v. Sheboygan & F. R. Co.*, 40 Wis. 653.

⁷ *Phil. W., & B. R. Co. v. Williams*, 54 Pa. St. 103.

⁸ *Leverin v. Cole*, 38 Iowa, 463; *Wilson v. European & N. A. R. Co.*, 67 Me. 358; *Michigan A. L. R. Co. v. Barnes*, 40 Mich. 383.

⁹ *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538.

¹⁰ *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 454.

¹¹ *Watson v. New York Cent. R. Co.*, 47 N. Y. 157, 1 Sheldon, 159.

¹² *Rosa v. Mo., K., & T. R. Co.*, 18 Kan. 124.

terms "persons interested" are allowed a more comprehensive signification than the word "owners."¹

A mortgagee is included in the terms "parties interested" who are to receive notice.² Where the award is made to the mortgagor, the legal owner may in equity secure his interest, which has by the condemnation been converted into money.³

The vendee in a written contract of sale, made before the taking, the conditions of which he has fulfilled, may maintain a petition for damages,⁴ or prosecute his claim in the name of the vendor.⁵ The trustee, and not the *cestui que trust*, is the proper person to petition for an assessment of the damages;⁶ but he need not describe himself as trustee in the petition.⁷ The company cannot take advantage of the objection that the *cestui que trust* is joined with the trustee in the petition for damages.⁸

The lessor and the lessee are each entitled to compensation for the injury suffered by each respectively, except where the lease reserves the entire damages to the lessor.⁹ The lessee is entitled to the value of a new lease made before the taking, which was to take effect on the expiration of an existing one.¹⁰ He is entitled to be allowed the value of a covenant of renewal.¹¹

The omission of interested parties from the award will not invalidate the proceedings as to those included,¹² or as to one who, though omitted, has accepted his share of the amount awarded.¹³

¹ State v. Easton & A. R. Co., 7 Vroom, 181.

² Wilson v. European & N. A. R. Co., 67 Me. 358; Platt v. Bright, 2 Stewart (N. J.), 128, 4 Stewart (N. J.), 81, 5 Stewart (N. J.), 362; Severin v. Cole, 38 Iowa, 463; Hagar v. Brainard, 44 Vt. 294. But see Breed v. Eastern R. Co., 5 Gray, 470, note; Farnsworth v. Boston, 126 Mass. 1.

³ Bright v. Platt, 5 Stewart (N. J.), 362, 4 Stewart (N. J.), 81, 2 Stewart (N. J.), 128.

⁴ Pinkerton v. Boston & A. R. Co., 109 Mass. 527; St. Louis, L., & D. R. Co. v. Wilder, 17 Kan. 239.

⁵ McIntyre v. Easton & A. R. Co., 11 C. E. Green, 425.

⁶ Davis v. Charles River Branch R. Co., 11 Cush. 506; State v. Easton & A. R. Co., 7 Vroom, 181.

⁷ Hawkins v. County Com'rs, 2 Allen, 254.

⁸ Reed v. Hanover Branch R. Co., 105 Mass. 303.

⁹ Parks v. Boston, 15 Pick. 198; Edmands v. Boston, 108 Mass. 535; Cobb v. Boston, 109 Mass. 438; Lawrence v. Boston, 119 Mass. 126; Burbridge v. New Albany & S. R. Co., 9 Ind. 546; Turnpike Road v. Brosi, 22 Pa. St. 29; Brown v. Powell, 25 Pa. St. 229; Heise v. Penn. R. Co., 62 Pa. St. 67; Voeghty v. Pittsburgh & Ft. W. R. Co., 2 Grant, 243; Colcough v. Nashville & N. W. R. Co., 2 Head, 171; Renwick v. D. & N. W. R. Co., 49 Iowa, 664; Baltimore & O. R. Co. v. Thompson, 10 Md. 76; Kohl v. United States, 91 U. S. 367.

¹⁰ Cobb v. Boston, 109 Mass. 438.

¹¹ North Penn. R. Co. v. Davis, 26 Pa. St. 238; Alabama & F. R. Co. v. Kenney, 39 Ala. 307.

¹² State v. Easton & A. R. Co., 7 Vroom, 181.

¹³ Whittlesey v. Hartford, P., & F. R.

Proof of Title.—The claimant of compensation for property taken must aver and prove his title; and the company may dispute his title, although it had included his name as a reputed owner in the written location of the railroad.¹ But a petition filed by the company against a person for the taking of his property and the assessment of damages, admits his title.² In some jurisdictions the special tribunal passes upon the title;³ while in others it cannot pass upon the right to compensation, but only determines the amount which the court is to distribute among the claimants.⁴

Proof of actual possession, under a claim of title in fee, is *prima facie* evidence of such title in proceedings for the assessment of damages for land taken.⁵ Proof of a deed to the party claiming the damages creates the same presumption.⁶ One who has only a base or qualified fee may recover the full amount of the damages.⁷ The true owner may maintain his right to the damages assessed against a trespasser or claimant who has no title to them.⁸

Right to open and close.—The party claiming damages is deemed the actor or plaintiff, and has the right to open and close, both

Co., 23 Conn. 421. But see as to the effect of the omission where the statute, requiring the names of interested parties to be included in the award or report, has not been complied with. *Pettis v. Providence*, 11 R. I. 372; *Warwick Institution v. Providence*, 12 R. I. 144; *North Reading v. County Com'rs*, 7 Gray, 109.

¹ *Directors of the Poor v. Wrightsville, Y., & G. R. Co.*, 7 W. & S. 236; *Allyn v. Providence, W., & B. R. Co.*, 4 R. I. 457; *Robbins v. Mil. & H. R. Co.*, 6 Wis. 636; *Kelly v. New York & M. B. R. Co.*, 10 N. Y. Week. Dig. 311. *Contra*, *Peoria, P., & J. R. Co. v. Laurie*, 63 Ill. 264. See *Knauff v. St. Paul, S., & T. F. R. Co.*, 22 Minn. 173; *Brisbine v. St. Paul & S. C. R. Co.*, 23 Minn. 114.

² *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316.

³ *Directors of the Poor v. Wrightsville, Y., & G. R. Co.*, 7 W. & S. 236; *Winebiddle v. Penn. R. Co.*, 2 Grant, 32; *Carpenter v. County Com'rs*, 21 Pick. 258; *Davis v. Charles River Branch R. Co.*, 11 Cush. 506; *Heise v. Penn. R. Co.*, 62 Pa. St. 67.

⁴ *Sacramento Valley R. Co. v. Moffat*,

7 Cal. 577; *Spring Valley Water Works v. San Francisco*, 22 Cal. 434; *San Francisco & St. J. R. Co. v. Mahoney*, 29 Cal. 112; *Mansfield, C., & L. M. R. Co. v. Clark*, 23 Mich. 519; *State v. Hudson Tunnel R. Co.*, 9 Vroom, 17; *Regina v. London & N. W. R. Co.*, 3 El. & B. 443.

⁵ *Missouri River, Ft. S., & G. R. Co. v. Owen*, 8 Kan. 409; *Hawkins v. County Com'rs*, 2 Allen, 254; *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544; *State Lunatic Hospital v. Worcester County*, 1 Met. 437; *St. Paul & S. C. R. Co. v. Matthews*, 16 Minn. 341; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 127; *Sacramento Valley R. Co. v. Moffat*, 7 Cal. 577; *Virginia & T. R. Co. v. Lynch*, 13 Nev. 92; *Chamberlain's Case*, L. R. 14 Ch. Div. 323. But see *Robbins v. Mil. & H. R. Co.*, 6 Wis. 636.

⁶ *Whitman v. Boston & M. R.*, 3 Allen, 133.

⁷ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

⁸ *Rooney v. Sacramento Valley R. Co.*, 6 Cal. 638; *East Tenn. & V. R. Co. v. Love*, 3 Head, 63; *Rosa v. Mo., K., & T. R. Co.*, 18 Kan. 124.

before the special tribunal or on appeal, and whether the petition for an assessment was filed by himself or by the company.¹

The Award or Verdict.—The award of the appraisers may be set aside for the reason that it is made on illegal evidence, or based on erroneous principles, or that the damages are grossly inadequate or excessive, or for the misconduct of the appraisers; but not for any technical departure from established rules, or merely because the award appears to be less or greater than the damages sustained.² It will be set aside for the omission of essential statements which the statute requires it to make.³ The objection that the appraisers have committed an error in law, if not apparent on the record, must be supported by proof.⁴ The special tribunal is, in some jurisdictions, not limited to strictly legal evidence; and if there has been error in this respect, the award will be allowed to stand, where no injustice appears to have been done. As the appraisers are usually allowed to take a view and to act upon the knowledge obtained from a personal inspection, there is a practical difficulty in setting aside their award on the ground that it is against evidence, or excessive or inadequate in amount.⁵

¹ Conn. River R. Co. v. Clapp, 1 Cush. 559; Winnisimmet Co. v. Grueby, 111 Mass. 543; Minnesota Valley R. Co. v. Doran, 17 Minn. 188; St. Paul & S. C. R. Co. v. Murphy, 19 Minn. 500; Evansville & C. R. Co. v. Miller, 30 Ind. 209; Grand Rapids & I. R. Co. v. Horn, 41 Ind. 479; Charleston & S. R. Co. v. Blake, 12 Rich. 634.

² Winebiddle v. Penn. R. Co., 2 Grant, 32; Penn. R. Co. v. Lutheran Congregation, 53 Pa. St. 445; Pearl Street Case, 19 Wend. 651; Troy & B. R. Co. v. Lee, 13 Barb. 169; New York Cent. & H. R. R. Co., *In re*, 64 N. Y. 60, 5 Hun, 105, 15 Hun, 63; Prospect Park & C. I. R. Co., *In re*, 13 Hun, 345, 16 Hun, 261; Rochester & G. V. R. Co. v. Beckwith, 10 How. Pr. 168; Rondout & O. R. Co., *In re*, 38 How. Pr. 187; Albany & S. R. Co. v. Dayton, 10 Abbott Pr. n. s. 182; New Jersey R. & T. Co. v. Suydam, 2 Harrison, 25; Bennet v. Camden & A. R. Co., 2 Green (N. J.), 145; Piper's Appeal, 32 Cal. 530; Central Pacific R. Co. v. Pearson, 35 Cal. 247; St. Louis & St. J. R. Co. v. Richardson, 45 Mo. 466; Hannibal

& St. J. R. Co. v. Muder, 49 Mo. 165, 166; Lee v. Tebo & N. R. Co., 53 Mo. 178; Kansas City, St. J., & C. B. R. Co. v. Campbell, 62 Mo. 585; Virginia & T. R. Co. v. Elliott, 5 Nev. 358; Virginia & T. R. Co. v. Henry, 8 Nev. 165; Michigan A. L. R. Co. v. Barnes, 6 Northwest. Rep. 651; Eastern R. Co. v. Concord & P. R. Co., 47 N. H. 108; Walker v. Boston & M. R., 3 Cush. 1; Penny's Case, 7 El. & Bl. 660.

³ Ohio & P. R. Co. v. Wallace, 14 Pa. St. 245; Reitenbaugh v. Chester Valley R. Co., 21 Pa. St. 100; Zack v. Penn. R. Co., 25 Pa. St. 394; O'Hara v. Penn. R. Co., 25 Pa. St. 445; Penn. R. Co. v. Porter, 29 Pa. St. 165; Phil. & E. R. Co. v. Cake, 37 Leg. Int. 425.

⁴ Coster v. New Jersey R. Co., 3 Zab. 227, 4 Zab. 730; Central Pacific R. Co. v. Pearson, 35 Cal. 247; Hannibal & St. J. R. Co. v. Muder, 49 Mo. 165; Penny's Case, 7 El. & Bl. 660. See Penn. R. Co. v. Lutheran Congregation, 53 Pa. St. 445.

⁵ William & A. Streets, *In re*, 19 Wend. 678; Troy & B. R. Co. v. Northern Turnp. Co., 16 Barb. 100; Troy & B. R. Co. v.

The verdict of a jury empanelled to assess the damages may be set aside for misconduct, or when clearly against evidence, or for omissions of proper instructions when asked, or when the damages are clearly inadequate or excessive, but not because they appear to fall below or exceed what the court which is asked to correct the verdict might have found.¹

The award of the special tribunal is not admissible as evidence on a trial by jury on appeal.² The judgment will be rendered on the verdict of the jury though it may be less than the award.³ The land-owner may recover the amount of the final award, although the company gave a bond as security for the payment of the damages which should be found due, and he is not required, instead of enforcing the award, to bring an action upon the bond.⁴

The final award by the special tribunal is a judicial act, and unless set aside by proper proceedings is like a judgment, *res judicata*, and cannot be impeached collaterally.⁵ An action cannot afterwards be maintained on the ground that the appraisers did not consider certain injuries,⁶ or were misled by representations of the company's agents that the road was to be constructed

Lee, 13 Barb. 169; Prospect Park & C. I. R. Co. v. Washington Cemetery, 20 Hun, 184; Coster v. New Jersey R. & T. Co., 3 Zab. 227, 4 Zab. 730; Virginia & T. R. Co. v. Henry, 8 Nev. 165; Winebiddle v. Penn. R. Co., 2 Grant, 32; Willing v. Baltimore R. Co., 5 Whart. 460; Evansville, I., & C. S. L. R. Co. v. Cochran, 10 Ind. 560; Chicago & I. R. Co. v. Hopkins, 90 Ill. 316; Western Pacific R. Co. v. Reed, 35 Cal. 621. It has been held that a jury taking a view must base their verdict on evidence given in court. Harrison v. Iowa Midland R. Co., 36 Iowa, 323. *Contra*, Mitchell v. Ill. & St. L. R. & C. Co., 85 Ill. 566. See Pittsburg, Ft. W., & C. R. Co. v. Swinney, 59 Ind. 100; Bangor & P. R. Co. v. McComb, 60 Me. 290; Wakefield v. Boston & M. R., 63 Me. 385. The granting or refusal of a view is, in the absence of a statute requirement, a matter of judicial discretion. Snow v. Boston & M. R., 65 Me. 230; Galena & S. W. R. Co. v. Haslam, 73 Ill. 494; Kansas Cent. R. Co. v. Allen, 22 Kan. 285.

¹ Illinois & W. R. Co. v. Von Horn, 18 Ill. 257; Jacksonville, A., & St. L. R. Co. v. Caldwell, 21 Ill. 75; Tonica & P. R. Co.

v. Unsicker, 22 Ill. 221; Tonica & P. R. Co. v. Roberts, 22 Ill. 224; Illinois & St. L. R. & C. Co. v. McClintock, 63 Ill. 514; Rockford, R. I., & St. L. R. Co. v. McKinley, 64 Ill. 338; Cape Girardeau & S. C. M. R. Co. v. Dennis, 67 Mo. 438; Willing v. Balt. R. Co., 5 Whart. 460; Penn. R. Co. v. Heister, 8 Pa. St. 445; Penn. R. Co. v. German Lutheran Congregation, 53 Pa. St. 445; Phil. W., & B. R. Co. v. Gesner, 20 Pa. St. 240; Cadmus v. Central R. Co., 2 Vroom, 179; Fitchburg R. Co. v. Boston & M. R., 3 Cush. 58; Whitman v. Boston & M. R., 3 Allen, 133.

² Ennis v. Wood River Branch R. Co., 12 R. I. 73.

³ *Id.*

⁴ Fisher v. Warwick R. Co., 12 R. I. 287.

⁵ Secombe v. Mil. & St. P. R. Co., 23 Wall. 108; Hamilton v. Annapolis & E. R. R. Co., 1 Md. Ch. 107; Butman v. Vt. Cent. R. Co., 27 Vt. 500; Evans v. Haefner, 29 Mo. 141; Chicago & A. R. Co. v. Springfield & N. W. R. Co., 67 Ill. 142; Townsend v. Chicago & A. R. Co., 91 Ill. 545.

⁶ Perley v. Boston, C., & M. R. Co., 57 N. H. 212.

in a manner less injurious to the land-owner than that which was in fact subsequently adopted.¹ But facts essential to the jurisdiction of the tribunal before which the proceedings were had may be contested collaterally.² Proof has been admitted in an action of tort to show that the jury in the special remedy considered the injury for which the action was brought;³ but the better view is, that it must be presumed conclusively, except in a direct proceeding to set aside the award, that all proper elements of damage were included, and no other.⁴

The special tribunal for assessing damages — commissioners, appraisers, or viewers — exercises a special delegated power, and it should appear on the face of the proceedings that they acted in the appointed mode.⁵ But where the jurisdiction of an inferior tribunal is shown, the presumption is in favor of the regularity of its action.⁶

Certiorari. — The proceedings of inferior tribunals in the taking of land may be inquired into and quashed on *certiorari*;⁷ and they may be restrained by a writ of prohibition where the taking is unlawful.⁸ The remedy of *certiorari* is granted in the discretion of the court.⁹ It is not available where there is a specific

¹ Butman v. Vt. Cent. R. Co., 27 Vt. 500.

² Adams v. Saratoga & W. R. Co., 10 N. Y. 328. See Dyckman v. New York, 5 N. Y. 434.

³ Baltimore & P. R. Co. v. Magruder, 34 Md. 79.

⁴ Tucker v. Erie & N. E. R. Co., 27 Pa. St. 281; *ante*, p. 177.

⁵ New Jersey, R., & T. Co. v. Suydam, 2 Harrison, 25; Central Pacific R. Co. v. Pearson, 35 Cal. 247; Virginia & T. R. Co. v. Lovejoy, 8 Nev. 100; People v. Brighton, 20 Mich. 57; Nichols v. Bridgeport, 23 Conn. 189, 208; Judson v. Bridgeport, 25 Conn. 426; Chicago v. Rock Island R. Co., 20 Ill. 286; Lyon v. Green Bay & M. R. Co., 42 Wis. 538; City of Buffalo, *In re*, 78 N. Y. 362; Phil. & E. R. Co. v. Cake (Penn. S. C.), 9 Weekly Notes of Cases, 72. See Walker v. Boston & M. R., 3 Cush. 1.

⁶ Chicago, B., & Q. R. Co. v. Chamberlain, 84 Ill. 383.

⁷ Bennet v. Camden & A. R. Co., 2

Green (N. J.), 145; New Jersey, R., & T. Co. v. Suydam, 2 Harrison, 25; Vail v. Morris & E. R. Co., 1 Zab. 189; Doughty v. Somerville & E. R. Co., 1 Zab. 442; State v. Montclair R. Co., 6 Vroom, 328; State v. Hudson Tunnel R. Co., 9 Vroom, 548; Central R. Co. v. Penn. R. Co., 4 Stewart (N. J.), 475, 492; Delaware, L., & W. R. Co. v. Burson, 61 Pa. St. 369; Charlestown Branch R. Co. v. County Com'rs, 7 Met. 78; Fitchburg R. Co. v. Boston & M. R., 3 Cush. 58; Charles River Branch R. v. County Com'rs, 7 Gray, 389; Farmington River W. P. Co. v. County Com'rs, 112 Mass. 206; Worcester & N. R. Co. v. Railroad Com'rs, 118 Mass. 561; Boston & M. R. v. Folsom, 46 N. H. 64; Allen v. Levee Com'rs, 57 Miss. 163.

⁸ Vermont & M. R. Co. v. County Com'rs, 10 Cush. 12; Day v. Springfield, 102 Mass. 310; Conn. River R. Co. v. County Com'rs, 127 Mass. 50, 57.

⁹ Regina v. Sheward, L. R. 5 Q. B. Div. 179.

remedy, and it does not lie where, though formal and technical errors exist, substantial justice has been done.¹

Waiver of Irregularities. — Irregularities and defects in the proceedings for taking property and for assessing the damages may be waived by the owner. His acceptance of the compensation awarded estops him from setting up such irregularities, and effects a transfer of the property as fully as if the proceedings had been in all respects legal.² A waiver of the irregularities will be implied from his initiation of proceedings for the assessment of the damages,³ from a voluntary appearance in which he contested only the amount of the damages,⁴ from an appeal from the award,⁵ and from acquiescence.⁶ An acceptance of the award is also a waiver of the appeal.⁷ The company is estopped from setting up irregularities which it caused or has waived by its own acts.⁸

Costs. — Costs are recoverable in proceedings for condemnation only when given by the statute;⁹ but some provision allowing them is usually made.¹⁰ The company against whom damages are awarded on appeal is "the losing party" under the statute giving damages against such party, although the amount awarded

¹ *Boston & M. R. v. Folsom*, 46 N. H. 64.

² *Dodge v. Burns*, 6 Wis. 514; *Burns v. Mil. & M. R. Co.*, 9 Wis. 450; *Karber v. Nellis*, 22 Wis. 215; *Hawley v. Harrall*, 19 Conn. 142; *Whittlesey v. Hartford, P., & F. R. Co.*, 23 Conn. 421; *Hitchcock v. Danbury & N. R. Co.*, 25 Conn. 516; *Embury v. Conner*, 3 N. Y. 511; *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234; *Hatch v. Hawkes*, 126 Mass. 177; *Troy & B. R. Co. v. Potter*, 42 Vt. 265; *Quincy, M., & P. R. Co. v. Kellogg*, 54 Mo. 334; *Town v. Blackberry*, 29 Ill. 137; *Rees v. Chicago*, 38 Ill. 322; *Kile v. Yellowhead*, 80 Ill. 208. But see *House v. Rochester*, 15 Barb. 517. The acceptance of the compensation is held not to waive the trespass committed by an unauthorized entry. *Powers v. Hurmert*, 51 Mo. 136.

³ *Pinkham v. Chelmsford*, 109 Mass. 225; *Fitchburg R. Co. v. Boston & M. R.*, 3 Cush. 58; *Flagg v. Worcester*, 8 Cush. 69.

⁴ *Dyckman v. New York*, 5 N. Y. 434.

⁵ *Delaware, L., & W. R. Co. v. Burson*, 61 Pa. St. 369; *Borland v. Miss. & M. R. Co.*, 8 Iowa, 148; *Johnston v. Rankin*, 70 N. C. 550.

⁶ *Dietrich v. Murdock*, 42 Mo. 279.

⁷ *Miss. M. R. Co. v. Byington*, 14 Iowa, 572.

⁸ *St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 419; *Higgins v. Chicago*, 18 Ill. 276; *Chicago v. Wheeler*, 25 Ill. 478.

⁹ *Metler v. Easton & A. R. Co.*, 8 Vroom, 222; *Greenville & C. R. Co. v. Partlow*, 6 Rich. 286; *Phil., G., & N. R. Co. v. Johnson*, 2 Whart. 275; *Herbein v. Phil. & R. R. Co.*, 9 Watts, 272; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 122.

¹⁰ *Commonwealth v. Boston & M. R.*, 3 Cush. 25; *Harvard Branch R. Co. v. Rand*, 8 Cush. 218; *New Haven & N. Co. v. Northampton*, 102 Mass. 116; *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365; *Rensselaer & S. R. Co. v. Davis*, 55 N. Y. 145; *Atlantic & St. L. R. Co. v. County Com'rs*, 28 Me. 112; *Metropolitan Dist. R. Co. v. Sharpe*, L. R. 5 App. Cas. 425.

on appeal is less than that found by the tribunal from which the appeal was taken.¹ Costs, when recoverable, are on the same footing as damages, and are to be paid before the company's title vests.²

Limitation to the Remedy.—The special remedy is not barred by the Statute of Limitations, which is construed to apply only to actions at common law; but it is usually barred by some express provision in the statute which creates the remedy.³ It is within the power of the legislature to make such a limit for applications for damages.⁴

Property and Rights requiring Compensation.—It is proper now to consider what acts done under the authority of the State are a *taking* of private property in the constitutional sense.

Land occupied permanently.—The owner is entitled to compensation for land and materials appropriated for permanent use, as for a railroad, to be estimated at their market value.⁵ The owners of a cemetery are entitled to compensation for the laying out of a railroad track across it.⁶

Injuries to Franchises.—The grant of an exclusive right to build a railroad within certain limits, which takes effect as a contract, is a franchise which is deemed to be taken and to require compensation when another railroad is authorized within such limits; but such exclusive right does not exist without an express grant.⁷

Property acquired under the Right of Eminent Domain.—Property acquired by a corporation for a public use, whether its estate is an easement or a fee, is private property, and cannot

¹ Bangor & P. R. Co. v. Chamberlain, 60 Me. 285; Goodwin v. Boston & M. R., 63 Me. 363.

² Chicago & M. R. Co. v. Bull, 20 Ill. 218.

³ Delaware, L., & W. R. Co. v. Burson, 61 Pa. St. 369; McClinton v. Pittsburg, Ft. W., & C. R. Co., 66 Pa. St. 404; Jefferson & L. P. R. Co. v. New Orleans, 31 La. An. 478; Flagg v. Worcester, 13 Gray, 601; Erskine v. Boston, 14 Gray, 216; Revere v. Boston, 14 Gray, 218.

The Statute of Limitations was held to apply in Foster v. Cumberland Valley R. Co., 23 Pa. St. 371.

⁴ Simms v. Memphis, C., & L. R. Co., 12 Heisk. 621; Reckner v. Warner, 22 Ohio St. 275.

⁵ Giesy v. Cincinnati, W., & Z. R. Co., 4 Ohio St. 308.

⁶ Washington Cemetery v. Prospect Park & C. I. R. Co., 68 N. Y. 591, 7 Hun, 655, 20 Hun, 184.

⁷ Ante, pp. 153, 154.

be taken for another public use without compensation; and the corporation is entitled to compensation although the legislature reserved the power to alter and repeal its charter.¹ The appropriation of a part of its location to the exclusive use of another company is clearly a taking of its property; but there is a distinction between easements which are to be deemed a taking, and duties which the State may impose in the exercise of its power to regulate private and public rights.²

The erection and maintenance by a telegraph company of suitable structures for its line within the location entitles the railroad company to compensation.³ The right of the company to occupy a public highway with its railroad has been held a franchise for the taking of which compensation must be made.⁴ But the inclusion of its location within a public park is not such a taking.⁵

Highway Crossings. — The laying out of a highway across land of a railroad company which is used for a station, or for other purposes than a right of way, is a taking of its property entitling it to compensation.⁶ So, also, it is entitled to compensation where the highway appropriates lengthwise a part of its right of way.⁷ The laying out of a highway across the company's track, without further interference with it, is, however, not a taking of its property. The State, in authorizing the crossing, simply regulates and adjusts private rights with reference to public interests, and exercises its reserved police power.⁸ The crossing should be laid in a manner to cause as little injury as

¹ Grand Rapids, N., & L. S. R. Co. v. Grand Rapids & I. R. Co., 35 Mich. 265; Old Colony & F. R. Co. v. Plymouth County, 14 Gray, 155; *ante*, p. 152.

² See *infra*, note 7.

³ Atlantic & P. R. Co. v. Chicago, R. I., & P. R. Co., 6 Biss. 158; Southwestern R. Co. v. Southern & A. Tel. Co., 46 Ga. 43. See Western Union R. Co. v. Rich, 19 Kan. 517.

⁴ Southwark R. Co. v. Phil., 47 Pa. St. 325.

⁵ Com'rs of Central Park, *In re*, 63 Barb. 282.

⁶ Albany Northern R. Co. v. Brownell, 24 N. Y. 345; Phil., W., & B. R. Co. v. Philadelphia, 9 Phil. 563.

⁷ Crossley v. O'Brien, 24 Ind. 325.

See Lafayette Plank Road Co. v. New Albany & S. R. Co., 13 Ind. 90.

⁸ Albany Northern R. Co. v. Brownell, 24 N. Y. 345; Boston & A. R. Co. v. Greenbush, 52 N. Y. 510, 5 Lans. 461; Sixth Avenue R. Co. v. Kerr, 45 Barb. 138. But see Old Colony & F. R. R. Co. v. Plymouth County, 14 Gray, 155; Grand Junction, R., & D. Co. v. County Com'rs, 14 Gray, 553; Com'rs on Inland Fisheries v. Holyoke Water Power Co., 104 Mass. 446, 457; *post*, pp. 217, 218. As to the right of a turnpike company to compensation when a railroad crossing is constructed upon the turnpike. Baltimore & H. Turnp. Co. v. Union R. Co., 35 Md. 224; Seneca Road Co. v. Auburn & R. R. Co., 5 Hill, 170.

possible to the previous use, and the railroad company is entitled to compensation where the crossing is so constructed as to result in serious inconvenience.¹

Railroad Crossings.—Where a company's location is subjected to a railroad crossing, in a manner not substantially interfering with the use thereof, or causing damage to the road-bed, its property is not taken in the constitutional sense.² But the use of its rails for running trains,³ or the laying of tracks upon its location⁴ by another company, under authority of law, is such a taking. The grant of a right to one company to lay a track on a highway is not exclusive, and similar rights may be given to other companies without compensation for injury to the earlier franchise.⁵

Preliminary Surveys.—Preliminary surveys and explorations for determining the route of a railroad may be authorized by the State, without compensation being previously paid or secured to the owner, even though the Constitution requires the payment of compensation to precede a taking. No estate is thereby taken, and the owner is not deprived of the use and enjoyment of his property. The entry, however, to be justified on this ground, must be for a temporary purpose, and accompanied with no unnecessary damage.⁶ But the occupation be-

¹ Northern Cent. R. Co. v. Baltimore, 46 Md. 425; Chicago & N. W. R. Co. v. Chicago & P. R. Co., 6 Biss. 219.

² Brooklyn Cent. & J. R. Co. v. Brooklyn City R. Co., 33 Barb. 420; Kerr's Case, 42 Barb. 119; New York & H. R. Co. v. Forty-Second St. & G. St. F. R. Co., 50 Barb. 309; Lake Shore & M. S. R. Co. v. Cincinnati, S., & C. R. Co., 30 Ohio St. 604. See Morris & E. R. Co. v. Central R. Co., 2 Vroom, 205; State v. Easton & A. R. Co., 7 Vroom, 181; Eastern R. Co. v. Concord & P. R. Co., 47 N. H. 108. The right to compensation for the crossing may be given by statute. Lockport & B. R. Co., *In re*, 77 N. Y. 557, 15 Hun, 365, 19 Hun, 38; Boston, Hoosac Tunnel, & W. R. Co., *In re*, 79 N. Y. 64, 58 How. Pr. 167; *post*, pp. 217, 218.

³ Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co., 5 C. E. Green, 61; Metropolitan R. Co. v. Quincy R. Co., 12 Allen, 262. See Boston & W. R.

Co. v. Western R. Co., 14 Gray, 253; Lexington & W. C. R. Co. v. Fitchburg R. Co., 14 Gray, 266; Sixth Avenue R. Co. v. Kerr, 45 Barb. 38.

⁴ Worcester & N. R. Co. v. Railroad Com'rs, 118 Mass. 561.

⁵ Brooklyn City & N. R. Co. v. Coney Island & B. R. Co., 35 Barb. 364; New York & H. R. Co. v. Forty-Second St. & G. St. F. R. Co., 50 Barb. 285, 309; Metropolitan R. Co. v. Highland R. Co., 118 Mass. 290; Canyonville & G. Road Co. v. Stephenson, 8 Oreg. 263. See Waterbury v. Dry Dock, E. B., & B. R. Co., 54 Barb. 388.

⁶ Bloodgood v. Mohawk & H. R. Co., 14 Wend. 51, 18 Wend. 9; Polly v. Saratoga & W. R. Co., 9 Barb. 449; Bonaparte v. Camden & A. R. Co., Baldwin, 205; Winslow v. Gifford, 6 Cush. 327; Cushman v. Smith, 34 Me. 247; Eaton v. Boston, C., & M. R. Co., 51 N. H. 504, 525; Orr v. Quimby, 54 N. H. 590; Lyon v. Green Bay & M. R. Co., 42 Wis. 538;

comes a taking when it extends to an interference with the owner's use, or to the construction of works upon the land, or to acts which are in the nature of waste.¹

Rights of Land-owners in Highways.—The owners of land lying upon highways are generally, whether owners of the fee of the highway or not, held to have an interest in the highway and rights of access and use, at least so long as it is maintained, which, though subject to regulation and modification for purposes of repair and improvement, require compensation when they are seriously obstructed by private corporations acting under public authority.² In the next chapter the rights of such proprietors will be more fully treated.³

Interference with the Owner's Use; Flooding of Land.—The term "property" comprehends the rights which pertain to the ownership of things real or personal, and a substantial invasion of those rights, under authority of law, is a taking in the constitutional sense.⁴ A permanent and exclusive appropriation to a public use, or an entire divesting of the title, is not essential to a taking; but it is sufficient if the owner is deprived of, or seriously interrupted in, the ordinary use of the land or other subject of property. His right of use for all lawful purposes is the most essential quality of property, and includes the right to exclude others from such use. "Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution."⁵ Thus, the flooding of land continuously, or even intermittently, caused by the construction of a dam or of other erections for a public use, is a taking which requires

Neal v. Pittsburg & C. R. Co., 31 Pa. St. 19, 2 Grant, 137; Walther v. Warner, 25 Mo. 277; Doughty v. Somerville & E. R. Co., 3 Halst. Ch. 51, 63; State v. Seymour, 6 Vroom, 47; Steuart v. Baltimore, 7 Md. 500.

¹ Davis v. San Lorenzo R. Co., 47 Cal. 517; Morris & E. R. Co. v. Hudson Tunnel R. Co., 10 C. E. Green, 384. See ante, p. 165.

² Lexington & O. R. Co. v. Applegate, 8 Dana, 289, 294; Elizabethtown, L., & B.

S. R. Co. v. Combs, 10 Bush, 382, 388; Haynes v. Thomas, 7 Ind. 38; Protzman v. Indianapolis & C. R. Co., 9 Ind. 467; Grand Rapids & S. R. Co. v. Heisel, 38 Mich. 62, 71.

³ Chap. VIII.

⁴ Eaton v. Boston, C., & M. R. Co., 51 N. H. 504, 511; Thompson v. Androscoggin R. I. Co., 54 N. H. 545, 551, 58 N. H. 108; East Penn. R. Co. v. Schlollenberger, 54 Pa. St. 144.

⁵ 13 Wall. 166, 181, Miller, J.

compensation.¹ An easement is property protected by the Constitution.²

Some authorities, however, do not regard certain interferences with interests in property, which, but for legal authority, would be actionable, as a taking. Thus, the Constitution has been held not to require compensation where the company, with proper authority and with due care and skill, diverts the water of a stream from its natural channel to the injury of a riparian proprietor, or, in consequence of proper dams erected by it, throws the water on land near its location.³

Actionable Injuries. Depreciation in Value of Land not taken.—The constitutional provision is considered by some jurists to protect private property against all injuries (except trespasses of a purely technical and nominal character) which would be actionable at common law but for the authority conferred by the State.⁴ It is construed as requiring compensation, not only for the land actually taken, but also for injury to the owner's remaining land, to the extent that his entire estate is depreciated in value by the taking;⁵ and for actionable injuries the land-owner will be entitled to his common-law remedies where no special remedy is provided by statute.⁷

¹ *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Hooker v. New Haven & N. Co.*, 14 Conn. 146, 15 Conn. 312; *Glover v. Powell*, 2 Stock. 211, 229; *Ten Eyck v. Del. & R. Canal Co.*, 3 Harrison, 200; *Trenton Water Power Co. v. Raff*, 7 Vroom, 335; *Lehigh Valley R. Co. v. McFarlan*, 4 Stewart (N. J.), 706, 726, 730, 3 Stewart (N. J.), 180; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504; *Thompson v. Androscoggin R. I. Co.*, 54 N. H. 545, 58 N. H. 108; *Lee v. Pembroke Iron Co.*, 57 Me. 481; *Kemper v. Louisville*, 14 Bush, 87, 93; *Cahill v. Eastman*, 18 Minn. 324; *Arimond v. Green Bay & M. Canal Co.*, 31 Wis. 316; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Ashley v. Port Huron*, 35 Mich. 296; *Evansville & C. R. Co. v. Dick*, 9 Ind. 433; *Wabash & E. Canal v. Spears*, 16 Ind. 441.

² *Arnold v. Hudson River R. Co.*, 55 N. Y. 661, 49 Barb. 108.

³ *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42; *Selden v. Del. & H. Canal*

Co., 29 N. Y. 634; *New York & E. R. Co. v. Young*, 33 Pa. St. 175; *Woodward v. Webb*, 65 Pa. St. 254. But see *post*, p. 200.

⁴ *West Branch & S. Canal Co. v. Mulliner*, 68 Pa. St. 357; *New Castle & F. R. Co. v. McChesney*, 85 Pa. St. 522.

⁵ *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504.

⁶ *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515, 539; *Winona & St. P. R. Co. v. Denman*, 10 Minn. 267; *Hursh v. St. Paul & P. R. Co.*, 17 Minn. 439, 449; *Utica, C., & S. V. R. Co., In re*, 56 Barb. 456; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478; *Virginia & T. R. Co. v. Henry*, 8 Nev. 165.

⁷ *Evansville & C. R. Co. v. Dick*, 9 Ind. 433; *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467; *Indiana Cent. R. Co. v. Boden*, 10 Ind. 96; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504; *Thompson v. Androscoggin R. I. Co.*, 54 N. H. 545, 58 N. H. 108; *Baltimore & P. R. Co. v.*

Consequential Injuries.—Consequential injuries not actionable at common law do not amount to a taking of private property, so as to require compensation under the constitutional restriction. A person suffering incidental injury from the reasonable use by another of his own property—which, in technical phrase, is *damnum absque injuria*—is without remedy at common law. The restriction is interpreted as designed not to give new rights, but to protect those already existing.¹ As a general rule, a person is not liable at common law for damages which result to another from the reasonable use of his own property. Where there are no prescriptive rights, and the acts complained of do not amount to a nuisance, he may, using due care and skill, make erections and excavations on his own land, and carry on business upon it, without becoming liable in damages to others who may suffer incidentally from his lawful use of his property.² This rule determines the liability of railway companies at common law, and is applied in construing the provision of the Constitution. Thus, except on proof of negligence or unskilfulness, they are not responsible for injuries caused by the issuing of sparks from their

Reaney, 42 Md. 117; Hooker v. New Haven & N. Co., 14 Conn. 146, 15 Conn. 312; Tinsman v. Belvidere Del. R. Co., 2 Dutcher, 148; Trenton Water Power Co. v. Raff, 7 Vroom, 335, 343; Sinnickson v. Johnson, 2 Harrison, 129.

¹ Radcliffe v. Brooklyn, 4 N. Y. 195; Gould v. Hudson River R. Co., 6 N. Y. 522, 535, 12 Barb. 616; Bellinger v. New York Cent. R. Co., 23 N. Y. 42; Selden v. Del. & H. Canal Co., 29 N. Y. 634; Coster v. Albany, 43 N. Y. 399; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 245; Corey v. Buffalo, C., & N. Y. R. Co., 23 Barb. 482; Hatch v. Vt. Cent. R. Co., 25 Vt. 49, 61, 28 Vt. 142; Richardson v. Vt. Cent. R. Co., 25 Vt. 465; Phil. & T. R. Co., *In re*, 6 Whart. 25; Monongahela Nav. Co. v. Coons, 6 W. & S. 101, 114; Henry v. Pittsburg & A. Bridge Co., 8 W. & S. 85; Mifflin v. Harrisburg, P., M., & L. R. Co., 16 Pa. St. 182, 193; Reitenbaugh v. Chester Valley R. Co., 21 Pa. St. 100; Sunbury & E. R. Co. v. Hummell, 27 Pa. St. 99; New York & E. R. Co. v. Young, 33 Pa. St. 175; Watson v. Pittsburg & C. R. Co., 37 Pa. St. 469; Clarke v. Birmingham & P. Bridge Co., 41 Pa. St.

147; Monongahela Bridge Co. v. Kirk, 46 Pa. St. 112; McKeen v. Delaware Div. Canal Co., 49 Pa. St. 424; Cleveland & P. R. Co. v. Speer, 56 Pa. St. 325; Spangler's Appeal, 64 Pa. St. 387; Woodward v. Webb, 65 Pa. St. 254; Freeland v. Penn. R. Co., 66 Pa. St. 91; Struthers v. Dunkirk, W., & P. R. Co., 87 Pa. St. 282; Morris & E. R. Co. v. Newark, 2 Stock. 352, 359; Rogers v. Kennebec & P. R. Co., 35 Me. 319, 323; Whittier v. Portland & K. R. Co., 38 Me. 26; Bradley v. New York & N. H. R. Co., 21 Conn. 294; Colorado Cent. R. Co. v. Mollandin, 4 Col. 154; Stetson v. Chicago & E. R. Co., 75 Ill. 74; Patterson v. Chicago, D., & V. R. Co., 75 Ill. 588. The doctrine is fully treated in Eaton v. Boston, C., & M. R. Co., 51 N. H. 504, and the text of the author's earlier work is cited on pp. 520, 521. It is also elaborately discussed in Thompson v. Andros-coggin R. I. Co., 54 N. H. 645, 58 N. H. 108.

² Radcliffe v. Brooklyn, 4 N. Y. 195; Hatch v. Vt. Cent. R. Co., 25 Vt. 49, 28 Vt. 142; Sabin v. Vt. Cent. R. Co., 25 Vt. 363.

engines,¹ or by excavations and embankments in the highway which render access to real estate lying upon it less convenient.² Nor is a person's property deemed to be taken so as to require compensation where he is subjected in its use to annoyances, like those of smoke and noise.³ The discontinuance of a street or bridge, whereby access to a person's land is made more difficult, is not an injury for which the Constitution secures compensation.⁴

Some authorities attempt a distinction between acts done under authority of law by a municipal or other public body in the execution of a public trust, and similar acts done under like authority by a private corporation acting primarily for a private advantage. They hold the latter responsible for certain injuries, called consequential, for which the former are held not liable.⁵ This distinction ought not, however, to be applied in the construction of the constitutional restriction. The use, appropriation, and effect produced, and not the agent which exercises the power of eminent domain, ought to determine whether there is a taking of private property.

Rights as affected by Statutes.—Statutes, which require in general terms compensation for injuries sustained by individuals in consequence of a public improvement, are sometimes construed to provide a special remedy for those injuries, and those only which would be actionable if committed without statute authority.⁶ Other statutes are construed as giving a remedy for certain consequential injuries which are not actionable at common law.⁷ On

¹ *Burroughs v. Housatonic R. Co.*, 15 Conn. 124; *Phil. & R. R. Co. v. Yeiser*, 8 Pa. St. 366; *Sunbury & E. R. Co. v. Hummell*, 27 Pa. St. 99.

² *Hatch v. Vt. Cent. R. Co.*, 25 Vt. 49, 23 Vt. 142; *Richardson v. Vt. Cent. R. Co.*, 25 Vt. 465; *Slatten v. Des Moines Valley R. Co.*, 29 Iowa, 148; *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294. But see *ante*, p. 195, and *post*, Chap. VIII. p. 241. The case of *Fletcher v. Auburn & S. R. Co.*, 25 Wend. 462, has been overruled. See *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42, 52.

³ *Parrot v. Cincinnati, H., & D. R. Co.*, 10 Ohio St. 624; *Watson v. Pittsburg & C. R. Co.*, 37 Pa. St. 469; *Atchison & N. R. Co. v. Garside*, 10 Kan. 552, 567; *Hatch v. Vt. Cent. R. Co.*, 25 Vt. 49, 28

Vt. 142. See *Chicago, M., & St. P. R. Co. v. Hall*, 90 Ill. 42.

⁴ *Smith v. Boston*, 7 Cush. 254; *Coster v. Albany*, 43 N. Y. 399.

⁵ *Alexander v. Milwaukee*, 16 Wis. 247; *Tinsman v. Belvidere Del. R. Co.*, 2 Dutcher, 148; *Trenton Water Power Co. v. Raff*, 7 Vroom, 335; *Evansville & C. R. Co. v. Dick*, 9 Ind. 433; *Eaton v. Boston, C., & M. R.*, 51 N. H. 504, 527.

⁶ *Columbia Delaware Bridge Co. v. Geisse*, 6 Vroom, 558, 5 Vroom, 268; *Lehigh Valley R. Co. v. Trone*, 28 Pa. St. 206. See *post*, p. 208.

⁷ *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379; *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294; *Hatch v. Vt. Cent. R. Co.*, 25 Vt. 49, 60.

the other hand, as already seen, the statute remedy may be more limited than the right secured by the Constitution, and to the extent that such remedy fails to protect the right, the remedy at common law remains.¹

A constitutional provision, requiring just compensation for property taken, and a statute providing for the assessment of damages for "the value of the land taken," are construed to be of the same import, and to include the value of land covered by the location and the injury to the residue of the owner's land.² A statute giving a special remedy to a party "injured" by the construction of the railroad is construed as substituting a special remedy for those existing at common law, and as confined to injuries which would be actionable but for the statute authority.³

Rights in Navigable and Other Waters.—Different views have been taken of the right of riparian proprietors to access to, and to the use of, navigable waters. According to one view, the State, being the owner, in its sovereign capacity, of the land under navigable waters, including the shore between high and low water mark, the riparian proprietor is not entitled to compensation under the constitutional provision when his access to the water is obstructed or taken away. His right is deemed to be of a public and not of a private nature, being shared by him in common with all citizens. Therefore the legislature may, without requiring compensation, authorize a railroad to be laid below high-water mark, constructed with embankments or other erections, which obstruct or cut off the riparian proprietor's access to the water, and prevent the valuable use of his land for wharfage.⁴

¹ See *ante*, pp. 167, 176, 196.

² *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478.

³ *Columbia Delaware Bridge Co. v. Geisse*, 6 Vroom, 558, 5 Vroom, 268.

⁴ *Gould v. Hudson River R. Co.*, 6 N. Y. 522, 12 Barb. 616; *Stevens v. Paterson & N. R. Co.*, 5 Vroom, 582, 5 C. E. Green, 126; *Penn. R. Co. v. New York & L. B. R. Co.*, 8 C. E. Green, 157; *Attorney-General v. Hudson Tunnel Co.*, 12 C. E. Green, 176; *Tomlin v. Dubuque & M. R. Co.*, 32 Iowa, 106; *Ingraham v. Chicago, D., & M. R. Co.*, 34 Iowa, 249; *Commonwealth v. Fisher*, 1 Pen. & W. 462; *New York & E. R. Co. v. Yeung*, 33 Pa. St. 175; *Clarke v. Birmingham & P.*

Bridge Co., 41 Pa. St. 147; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112; *McKeen v. Delaware Div. Canal Co.*, 49 Pa. St. 424; *Philadelphia v. Scott*, 81 Pa. St. 80; *Cameron Furnace Co. v. Penn. Canal Co.*, 2 Pearson, 208; *Bailey v. Phil., W., & B. R. Co.*, 4 Harring. (Del.) 389; *Rogers v. Kennebec & P. R. Co.*, 35 Me. 319; *Eaton v. Boston, C., & M. R.*, 51 N. H. 504, 524; *Austin v. Rutland R. Co.*, 45 Vt. 215; *Fitchburg R. Co. v. Boston & M. R.*, 3 Cush. 58, 88; *Davidson v. Boston & M. R.*, 3 Cush. 91, 105; *Boston & W. R. Co. v. Old Colony R. Co.*, 12 Cush. 605; *Harvard College v. Stearns*, 15 Gray, 1; *Thayer v. New Bedford R. Co.*, 125 Mass. 253. A statute may give

According to the other view, the riparian proprietor's right of access to navigable waters is, irrespective of his title to the water-bed, appurtenant to his land, and though subject to the public right of navigation and to regulation for the public convenience, is private property of which he cannot be deprived without compensation.¹ His right to the use of wharves and landing-places,² and to a fishery,³ is within the constitutional provision.

What are Navigable Waters. — By the common law as held in England, waters are deemed navigable only when they are subject to the ebb and flow of the tide; but in the United States they are deemed navigable irrespective of the ebb and flow of the tide, when they are in fact navigable. Accordingly, the riparian proprietor on a river which is in fact navigable has been held not entitled to compensation where the State authorizes the construction of public works on its bed, which result in injury to the owners of land upon its shore.⁴ Some authorities, however, distinguish between tidal rivers — those which are navigable in the sense of the common law — and non-tidal rivers, which are in fact navigable; and such authorities recognize the title of the riparian proprietor to the bed of rivers of the last description.⁵

compensation for riparian rights where the Constitution does not require it. *Renwick v. D. & N. W. R. Co.*, 49 Iowa, 664. If the riparian proprietor is under the law the owner of the soil between high and low water mark, he is entitled to compensation for the injury caused by the company's erections or works above low-water mark. *Lehigh Valley R. Co. v. Trone*, 28 Pa. St. 206.

¹ *Yates v. Milwaukie*, 10 Wall. 497; *Bowman v. Wathen*, 2 McLean, 376; *Avery v. Fox*, 1 Abbott U. S. 246; *Bell v. Gough*, 3 Zab. 624, 2 Zab. 441, 1 Zab. 156; *Keyport & M. P. S. Co. v. Farmers' Trans. Co.*, 3 C. E. Green, 13; *Chapman v. Oshkosh & M. R. Co.*, 33 Wis. 629; *Delaplaine v. Chicago & N. R. Co.*, 42 Wis. 214; *Diedrich v. Northwestern Union R. Co.*, 42 Wis. 248, 47 Wis. 662; *Brisbine v. St. Paul & S. C. R. Co.*, 23 Minn. 114; *Thompson v. Androscoggin R. I. Co.*, 58 N. H. 108, 54 N. H. 545; *Baltimore & O. R. Co. v. Chase*, 43 Md. 23; *Hickok v. Hine*, 23 Ohio St. 523; *Duke of Bucleuch v. Metropolitan Board*, L. R. 5 H. L. 418, L. R. 5 Exch. 221, L. R. 3

Exch. 306; *Lyon v. Fish Mongers' Co.*, L. R. 1 App. Cas. 662; *Bell v. Quebec*, L. R. 5 App. Cas. 84; *Regina v. Rynd*, 16 Irish C. L. 29.

² *Dutton v. Strong*, 1 Black, 23; *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272; *Rippe v. Chicago, D., & M. R. Co.*, 23 Minn. 18.

³ *Alexander & F. R. Co. v. Faunce*, 31 Gratt. 761.

⁴ *Barney v. Keokuk*, 94 U. S. 324; *Rundle v. Del. & R. Canal Co.*, 14 How. 80; *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Tomlin v. Dubuque, B., & M. R. Co.*, 32 Iowa, 106; *Renwick v. D. & N. W. R. Co.*, 49 Iowa, 664; *People v. Canal Appraisers*, 33 N. Y. 461; *Crill v. Rome*, 47 How. Pr. 398; *Thompson v. Androscoggin R. I. Co.*, 54 N. H. 545, 58 N. H. 108; *Carter v. Thurston*, 58 N. H. 104. See *Attorney-General v. Delaware & B. B. R. Co.*, 12 C. E. Green, 1, 631; *New Orleans, M., & C. R. Co. v. Frederic*, 46 Miss. 1; *Rowe v. Granite Bridge Co.*, 21 Pick. 344; *Glover v. Powell*, 2 Stock. 211.

⁵ *Varick v. Smith*, 9 Paige, 547; *Rippe*

Colonial Ordinances.—Under a colonial ordinance of Massachusetts, the flats on an arm of the sea where the tide ebbs and flows, to the extent of one hundred rods, are appurtenant to the upland.¹ The owner of the wharf or upland is, by virtue of this ordinance, entitled to compensation for the injury caused by the construction of a railroad upon the flats within that limit.²

Remedies against Unlawful Obstruction of Navigable Waters.—The unlawful obstruction of navigable waters is indictable as an infringement of a public right, and is actionable only when an individual suffers special damage, differing in kind from that suffered by others.³ Individuals suffering special damage are entitled to an injunction to restrain the nuisance.⁴

Authority to obstruct Navigation, how acquired.—The free navigation of navigable rivers is a public right, and the power to obstruct or change their course must be clearly given; and when not conferred, such obstruction is a public nuisance. The right to cross them by suitable structures, and in a manner that will not destroy or seriously impair their public use, may be implied where they intervene in a location which is defined by statute, or selected in the reasonable exercise of a discretion conferred by statute.⁵

Bridges across Navigable Waters.—Congress, under its power to regulate commerce among the States, may authorize bridges

v. Chicago, D., & M. R. Co., 23 Minn. 18; *Brisbane v. St. Paul & S. C. R. Co.*, 23 Minn. 114; *Chicago & P. R. Co. v. Stein*, 75 Ill. 41; *Steamboat Magnolia v. Marshall*, 39 Miss. 109. In Pennsylvania, the owner of land lying on a navigable river owns the soil to low-water mark. *Lehigh Valley R. Co. v. Trone*, 28 Pa. St. 206.

¹ *Commonwealth v. Alger*, 7 Cush. 53; *Commonwealth v. Roxbury*, 9 Gray, 451; *Boston v. Richardson*, 105 Mass. 351; *Wheeler v. Stone*, 1 Cush. 313.

² *Ashby v. Eastern R. Co.*, 5 Met. 368; *Commonwealth v. Boston & M. R.*, 3 Cush. 25; *Drury v. Midland R. Co.*, 127 Mass. 571, 583.

³ *Blood v. Nashua & L. R. Co.*, 2 Gray, 137; *Harvard College v. Stearns*, 15 Gray, 1; *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen, 221; *Blackwell v. Old Colony R. Co.*, 122 Mass.

1; *Tinsman v. Belvidere Del. R. Co.*, 2 Dutcher, 148; *South Carolina R. Co. v. Moore*, 28 Ga. 398; *Jarvis v. Santa Clara Valley R. Co.*, 52 Cal. 438; *Bell v. Quebec, L. R.* 5 App. Cas. 84.

⁴ *Hickok v. Hine*, 23 Ohio St. 523.

⁵ *Attorney-General v. Stevens, Saxton (N. J.)*, 369; *Attorney-General v. Hudson River R. Co.*, 1 Stock. 526; *Newark Plank Road v. Elmer*, 1 Stock. 754; *Stevens v. Erie R. Co.*, 6 C. E. Green, 259; *Attorney-General v. New York & L. B. R. Co.*, 9 C. E. Green, 49; *Fall River Iron Works Co. v. Old Colony & F. R. Co.*, 5 Allen, 221; *Hickok v. Hine*, 23 Ohio St. 523; *Union Pacific R. Co. v. Hall*, 91 U. S. 343; *Memphis & O. R. Co. v. Hicks*, 5 Sneed, 427; *Whitaker v. Delaware & H. C. Co.*, 87 Pa. St. 34. See *Miller v. Prairie du Chien & M. R. Co.*, 34 Wis. 533.

across navigable waters; and private persons, as riparian proprietors or owners of ferries, whose use of the waters is thereby obstructed, have no right of action.¹ A State may authorize bridges over navigable waters, and otherwise control and obstruct the use of such waters, subject, however, to the paramount authority of Congress to regulate international and inter-state commerce.²

The power to build a bridge across a navigable river carries with it the power to erect such piers and other structures as are usual in the construction of bridges authorized for the same purpose.³ The conditions imposed in the act authorizing the bridge must be complied with; and a failure to comply with them gives a right of action to a party suffering special damage thereby.⁴ The obstruction of a navigable river so as to cause land to be overflowed, or ancient mill-rights to be injured, entitles the owner of the land or rights to compensation.⁵

A company having begun the erection of a bridge across navigable waters, under authority of its charter, and afterwards discontinuing the erection, is required to remove the obstructions to navigation which it has thereby caused. Thus, where the contractors had placed piles in a river which were cut off a few feet under the surface of the water, the company was held liable for an injury to a steamboat which came in collision with them.⁶

Ferries across Navigable Waters. — The power to establish a ferry for crossing navigable or other waters may be given to a railroad company expressly or by implication;⁷ but such ferry is to be used only for the purposes of travel by the railroad, and not as a general ferry to the injury of an existing ferry franchise.⁸

¹ *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421, 13 How. 518; *Clinton Bridge, In re*, 10 Wall. 454; *South Carolina v. Georgia*, 93 U. S. 4; *Miss. River Bridge Co. v. Lonergan*, 91 Ill. 508.

² *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518, 18 How. 421; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *Clinton Bridge, In re*, 10 Wall. 454; *United States v. Mil. & St. P. R. Co.*, 5 Biss. 410, 419; *Wisconsin River Improvement Co. v. Manson*, 43 Wis. 255; *Talbot County v. Queen Anne's County*, 50 Md. 245, 261, 262.

³ *Clarke v. Birmingham & P. Bridge Co.*, 41 Pa. St. 147; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St. 112.

⁴ *Dugan v. Bridge Co.*, 27 Pa. St. 303; *Memphis & O. R. Co. v. Hicks*, 5 Sneed, 427; *Rogers v. Kennebec & P. R. Co.*, 35 Me. 319.

⁵ *Lee v. Pembroke Iron Co.*, 57 Me. 481.

⁶ *Phil. W., & B. R. Co. v. Phil. & H. Steam T. Co.*, 23 How. 209.

⁷ *State v. Wilmington & M. R. Co., Busbee (N. C.)*, 234.

⁸ *Fitch v. New Haven, N. L., & S. R. Co.*, 30 Conn. 38; *Aikin v. Western R. Co.*,

Where a discretion as to crossing waters by a bridge or ferry, or as to its location, is given to the company, the exercise of such discretion is not reviewable.¹

Interference with the Flow of Streams in their Natural Course. — The general power to construct a railroad authorizes the crossing of streams which are not navigable, and even their diversion from their natural course, to the extent the diversion is necessary in the proper construction of the railroad; but a substantial diversion, when not expressly authorized, is not permitted, where it can be avoided in the due execution of the works.² The diversion can be justified only on the ground of necessity, and not on the ground merely that it will diminish the expense of construction.³ The duty to restore the stream, as far as practicable, to its original course, and to make and maintain sufficient culverts and openings for the water so as to prevent unnecessary injury to land-owners, is often imposed by statute; but the duty is presumed to be equally incumbent in the absence of an express requirement.⁴ The company is liable to an action for injuries arising from its default in this regard, as compensation is presumed to have been awarded under the special remedy on the basis of its performance of its duty.⁵ This liability to a land-

20 N. Y. 370, 30 Barb. 38; *State v. Wilmington & M. R. Co.*, Busbee (N. C.), 234. A ferry can only be established by authority of the government. *Attorney-General v. Boston*, 123 Mass. 460, 478. The grantee of a ferry franchise holds it subject to the commercial power of Congress. *Miss. River Bridge Co. v. Lonergan*, 91 Ill. 508.

¹ *Stephens & C. Trans. Co. v. Central R. Co.*, 5 Vroom, 280; *Attorney-General v. New York & L. B. R. Co.*, 9 C. E. Green, 49; *Clarke v. Birmingham & P. Bridge Co.*, 41 Pa. St. 147.

² *Johnson v. Atlantic & St. L. R. Co.*, 35 N. H. 569; *Baltimore & P. R. Co. v. Magruder*, 34 Md. 79; *Whitaker v. Delaware & H. Canal Co.*, 87 Pa. St. 34. But see *Stodghill v. Chicago, B., & Q. R. Co.*, 48 Iowa, 26.

³ *Pugh v. Golden Valley R. Co.*, L. R. 12 Ch. Div. 274, 42 L. T. R. N. s. 863. See *post*, Chap. VIII. p. 245.

⁴ *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 486; *Cott v. Lewiston R. Co.*, 36 N.Y.

214; *Robinson v. New York & E. R. Co.*, 27 Barb. 512; *Walker v. Old Colony & N. R. Co.*, 103 Mass. 1, 16; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *March v. Portsmouth & C. R. Co.*, 19 N. H. 372; *Hatch v. Vt. Cent. R. Co.*, 28 Vt. 142; *Haynes v. Burlington*, 38 Vt. 350; *Chicago, R. I., & P. R. Co. v. Moffitt*, 75 Ill. 524; *Pittsburg, Ft. W., & C. R. Co. v. Gilleland*, 56 Pa. St. 445; *Young v. Chicago & N. R. Co.*, 28 Wis. 171; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538; *Valley R. Co. v. Bohm*, 34 Ohio St. 114.

⁵ *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42; *Conhocton Stone R. Co. v. Buffalo, N. Y., & E. R. Co.*, 3 Hun, 523, 51 N. Y. 573; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Estabrooks v. Peterborough & S. R. Co.*, 12 Cush. 224; *Blood v. Nashua & L. R. Co.*, 2 Gray, 137; *Mellen v. Western R. Co.*, 4 Gray, 301; *Perry v. Worcester*, 6 Gray, 544; *Walker v. Old Colony & F. R. R. Co.*, 103 Mass. 10; *Johnson v. At-*

owner exists whether any part of his land is taken or not.¹ The company, it has been held, is not bound to provide culverts which may be required only for extraordinary floods.²

The company is liable to an action for conducting water, which was opened up by its excavations, through an artificial channel upon an owner's land, where such a mode of discharging the water is not reasonably necessary to the maintenance of the railroad.³ It is not liable for the diversion of subterranean water caused by excavations within its location where such water is not running in a well-defined stream.⁴ It is not liable for the gradual washing away of adjoining land in consequence of a change of current caused by necessary structures which it has made within the location;⁵ and, having diverted water in a lawful and proper manner, it is not required thereafter to take further precautions to prevent injury to land-owners.⁶

The right of each owner of land lying upon a stream to the reasonable use of its water, and to have it flow in its ordinary course, is protected by the Constitution, and he is entitled to legal and equitable remedies against persons who divert or obstruct it to his material injury.⁷ The company's use of the stream

Atlantic & St. L. R. Co., 35 N. H. 569; *Spencer v. Hartford, P., & F. R. Co.*, 10 R. I. 14; *Whitaker v. Del. & H. C. Co.*, 87 Pa. St. 34; *Houston & G. N. R. Co. v. Parker*, 50 Tex. 330; *West v. Louisville, C., & L. R. Co.*, 8 Bush, 404; *Southside R. Co. v. Daniel*, 20 Gratt. 344; *Lawrence v. Great Northern R. Co.*, 16 Q. B. n. s. 643; *Bagnall v. London & N. W. R. Co.*, 7 H. & N. 423.

¹ *Hatch v. Vt. Cent. R. Co.*, 25 Vt. 49; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504; *Miss. Cent. R. Co. v. Caruth*, 51 Miss. 77; *Miss. Cent. R. Co. v. Mason*, 51 Miss. 234.

² *Pittsburg, Ft. W., & C. R. Co. v. Gilleland*, 56 Pa. St. 445; *Bellinger v. New York Cent. R. Co.*, 23 N. Y. 42; *Conhocton Stone Road Co. v. Buffalo, N. Y., & E. R. Co.*, 3 Hun, 523, 51 N. Y. 573. See *Houston & G. N. R. Co. v. Parker*, 50 Tex. 330, 345; *Kansas Pacific R. Co. v. Miller*, 2 Col. 442, 468; *Kansas Pacific R. Co. v. Lundin*, 3 Col. 94, 99; *Nitro Phosphate & O. C. M. Co. v. London & St. K. Docks Co.*, L. R. 9 Ch. Div. 503; *Countess of Rothes v. Kirkcaldy Water Works*

Com'rs, 6 Cas. Ct. Sessions, 4th ser. (Scotch), 974.

³ *Curtis v. Eastern R. Co.*, 14 Allen, 55, 98 Mass. 428.

⁴ *Galgay v. Great Southern & W. R. Co.*, 4 Irish C. L. 456; *Hardman v. North Eastern R. Co.*, L. R. 3 C. P. Div. 168; *Goodale v. Tuttle*, 29 N. Y. 459; *Wheatley v. Baugh*, 25 Pa. St. 528; *Swett v. Cutts*, 50 N. H. 439, 446.

⁵ *Henry v. Vt. Cent. R. Co.*, 30 Vt. 638.

⁶ *Norris v. Vt. Cent. R. Co.*, 28 Vt. 99.

⁷ *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Garwood v. New York Cent. & H. R. Co.*, 17 Hun, 356; *Robinson v. New York & E. R. Co.*, 27 Barb. 512; *Hatch v. Vt. Cent. R. Co.*, 25 Vt. 49, 28 Vt. 142; *Harding v. Stamford Water Co.*, 41 Conn. 87; *Blood v. Nashua & L. R. Co.*, 2 Gray, 137; *Estabrooks v. Peterborough & S. R. Co.*, 12 Cush. 224; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504; *Thompson v. Androscoggin R. I. Co.*, 54 N. H. 545, 58 N. H. 108; *Ten Eyck v. Del. & R. C. Co.*, 3 Harrison, 200; *Tinsman v.*

for supplying railway engines with water, in a manner not causing perceptible injury to the owner, is not actionable.¹

Surface Water.—The diversion, by the company, of surface water accumulated from rain and snow, and not running in a defined watercourse, by means of excavations and erections within the location, is not actionable, or an injury entitling the land-owner to compensation under the Constitution;² but this doctrine is not accepted in several States.³ The company may turn the surface water into natural streams, although by so doing it increases the volume of water to the injury of a proprietor below.⁴ It is liable to an action where the injury, resulting from the diversion, is caused by its want of proper care and skill in the construction of its works.⁵ The turning of the surface water on an adjoining piece of land may, under statutes, be an element of damage where a part of the land is taken.⁶

Ponds.—In Massachusetts, great ponds are public property; and the riparian proprietor is not entitled to compensation for the injury occasioned by the drawing off the water under legisla-

Belvidere Del. R. Co., 2 Dutcher, 148; Trenton Water Power Co. v. Raff, 7 Vroom, 335. Compare *Bellinger v. New York Cent. R. Co.*, 28 N. Y. 42. See, as to water flowing through an artificial channel, *Singh v. Koonj Behari Pattuk*, L. R. 4 App. Cas. 121; *Nield v. London & N. W. R. Co.*, L. R. 10 Exch. 4; and as to the right of the company to protect its works against unusual injury, by structures which cause an overflow on the adjoining land, *Nield v. London & N. W. R. Co.*, L. R. 10 Exch. 4.

¹ *Elliot v. Fitchburg R. Co.*, 10 Cush. 191. But see *Garwood v. New York Cent. & H. R. R. Co.*, 17 Hun, 356.

² *Dickinson v. Worcester*, 7 Allen, 19; *Greeley v. Maine Cent. R. Co.*, 53 Me. 200; *Morrison v. Bucksport & B. R. Co.*, 67 Me. 353; *Wagner v. Long Island R. Co.*, 2 Hun, 633, 5 Thomp. & C. 163; *Conhocton Stone Road Co. v. Buffalo, N. Y., & E. R. Co.*, 5 Thomp. & C. 651, 3 Hun, 523, 52 Barb. 390, 51 N. Y. 573; *Goodale v. Tuttle*, 29 N. Y. 459; *Bowlsby v. Speer*, 2 Vroom, 351; *Wakefield v. Newell*, 12

R. I. 75; *Atchison, T., & S. F. R. Co. v. Hammer*, 22 Kan. 763; *Munkers v. Kansas City, St. J., & C. B. R. Co.*, 60 Mo. 334.

³ *Gillham v. Madison County R. Co.*, 49 Ill. 484; *Toledo, W., & W. R. Co. v. Morrison*, 71 Ill. 616; *St. Louis, V., & T. H. R. Co. v. Capps*, 72 Ill. 188; *Jacksonville, N. W., & S. E. R. Co. v. Cox*, 91 Ill. 500; *Wabash & E. Canal Co. v. Spears*, 16 Ind. 441; *Hurdman v. North Eastern R. Co.*, L. R. 3 C. P. Div. 168. See *Swett v. Cutts*, 50 N. H. 439; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504, 531, 533; *Cornish v. Chicago, B., & Q. R. Co.*, 49 Iowa, 378; *McCormick v. Kansas City, St. J., & C. B. R. Co.*, 70 Mo. 359, 57 Mo. 433.

⁴ *Waffle v. New York Cent. R. Co.*, 58 Barb. 413, 53 N. Y. 11. But see *Noonan v. Albany*, 79 N. Y. 470.

⁵ *Hosher v. Kansas City, St. J., & C. B. R. Co.*, 60 Mo. 329; *Waterman v. Conn. & P. R. R. Co.*, 30 Vt. 610.

⁶ *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10.

tive authority, whereby his dwelling-house has become uncomfortable and unfit for the purposes for which it was designed.¹

Remedies for Injury to Riparian Rights. — The rule which makes the special remedy exclusive as to all injuries included within it, and limits the injured person's right of action at common law to unauthorized acts, or to the negligent use of lawful powers, applies in determining the remedies of persons who suffer injury by the diversion of streams.² An action at common law will lie where the act authorizing an interference with the riparian proprietor's right does not provide compensation.³

Construction of certain Statutes which provide Compensation.
Statute of Massachusetts. — The statute of Massachusetts imposes on the company the liability to "pay all damages occasioned by laying out and making and maintaining its road, or by taking any lands or materials" therefor, and provides a special remedy for assessing such damages. The remedy is held to apply not only to land included within the location, but also to all direct physical injuries done to property outside of it, under authority of the statute. Thus, it includes injuries to land outside of the location whenever committed in the due exercise of powers granted, — as, for instance, those caused by blasting rocks which are thrown on the adjacent land;⁴ by discharging on the adjacent land surface water,⁵ or underground water opened up by excavations;⁶ by drawing off the water of a well or spring outside of the location, in consequence of excavations;⁷ by the diversion of watercourses;⁸ the disturbance of rights of flowage;⁹ the ob-

¹ *Fay v. Salem & D. Aqueduct Co.*, 111 Mass. 27.

² *Estabrooks v. Peterborough & S. R. Co.*, 12 Cush. 224; *Baltimore & P. R. Co. v. Magruder*, 34 Md. 79; *ante*, p. 177.

³ *Robinson v. New York & E. R. Co.*, 27 Barb. 512; *Eaton v. Boston, C., & M. R.*, 51 N. H. 504.

⁴ *Dodge v. County Com'rs*, 3 Met. 380; *Brown v. Providence, W., & B. R. Co.*, 5 Gray, 35; *Curtis v. Eastern R. Co.*, 14 Allen, 55, 98 Mass. 428. *Contra*, for a neglect to remove them, which would be actionable, *Sabin v. Vt. Cent. R. Co.*, 25 Vt. 363; *Whitehouse v. Androscoggin Co.*, 52 Me. 208.

⁵ *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10.

⁶ *Curtis v. Eastern R. Co.*, 14 Allen, 55, 98 Mass. 428.

⁷ *Parker v. Boston & M. R.*, 3 Cush. 107; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359.

⁸ *Estabrooks v. Peterborough & S. R. Co.*, 12 Cush. 224; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385. But see *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504, 523; *Stodghill v. Chicago, B., & Q. R. Co.*, 43 Iowa, 26.

⁹ *White v. South Shore R. Co.*, 6 Cush. 412.

struction of a right of way appurtenant to land outside of the location;¹ and injuries to property in wharves and flats.² But the depreciation in the value of land not taken, resulting, not from any works of the company so near as to cause direct physical damage, but from inconveniences common to the community,—as where a railroad is laid across a highway leading to the estate,—is not an injury within the statute.³

English Statutes.—The liability of railway companies in England for land taken and injuries done in the lawful execution of their works is determined by two acts of Parliament, passed in 1845, which prescribe a special remedy for injuries sustained thereby. The first, “The Lands Clauses Consolidation Act,” ch. 18, 8 & 9 Vict., provides, § 68, a remedy for “any party” who “shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or *injuriously affected* by the execution of the works.” The second, “The Railway Clauses Consolidation Act,” ch. 20, 8 & 9 Vict., provides, § 6, that “in exercising the power given to the company by the special act to construct the railway, and to take lands for the purpose, . . . the company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special act, or any act incorporated therewith, vested in the company;” and further, § 16, that the company “may do all other acts necessary for making, maintaining, altering, or repairing and using the railway, provided always that, in the exercise of the powers by this or the special act granted, the company shall do as little damage as can be, and shall make full satisfaction in manner herein, and in the special

¹ *Parker v. Boston & M. R.*, 3 Cush. 107; *Boston Gas Light Co. v. Old Colony & N. R. Co.*, 14 Allen, 444.

² *Ashby v. Eastern R. Co.*, 5 Met. 368; *Commonwealth v. Boston & M. R.*, 8 Cush. 25; *Boston & W. R. Co. v. Old Colony R. Co.*, 12 Cush. 605; *Boston v. Richardson*, 105 Mass. 351, 363; *Drury v. Midland R. Co.*, 127 Mass. 571, 583.

³ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10; *Caledonian R. Co. v. Ogilvy*, 2 Macq. 229. See *Boston & M. R. v. Old Colony R. Co.*, 12 Cush. 605; *Gear v. C. C. & D. R. Co.*, 43 Iowa, 83.

act, and any act incorporated therewith, provided to all parties interested for all damage by them sustained by reason of the exercise of such powers.”¹

These acts are construed as securing, but not enlarging, existing rights, and as supplying a new remedy only where one would have been available at common law if the act complained of had not been authorized by Parliament. In determining whether land, not taken, has been “injuriously affected,” so as to entitle the owner to compensation, such injuries are to be considered, and such only as would have been actionable if the company had proceeded without statutory powers.² Thus, the overlooking of the premises from the railway and the obstruction of a view,³ or the vibration, smoke, and noise caused by passing trains,⁴ although depreciating the market value of land, are held not to “injuriously affect” it in the sense of the statute. But the obstruction of a private right of way, appurtenant to an estate, by means of gates erected by the company, was held to entitle the owner of the estate, though it was not crossed by the railway, to compensation.⁵ If, however, land is *taken* under the act, the owner’s compensation is not limited to injuries actionable at common law; but he is, in such a case, entitled to compensation for the depreciation in the value of his estate arising from the vibration, smoke, or sparks caused by or issuing from the engines, or from loss of the “amenities,” as of view and privacy.⁶

The peculiar terms used in the acts, as “the execution of the works,” “the construction” of the railway, and “the exercise of

¹ There is a difficulty in stating the construction of these acts, growing out of the conflicting cases, the dissenting opinions, and the reversal of judgments. In *Rickett v. Metropolitan R. Co.*, L. R. 2 H. L. 175, where the cases are reviewed, the Lord Chancellor, Chelmsford, confessed, “It appears to me to be a hopeless task to attempt to reconcile the cases upon the subject.”

² *Glover v. North Staffordshire R. Co.*, 16 Q. B. n. s. 912; *Rickett v. Metropolitan R. Co.*, L. R. 2 H. L. 175, 5 B. & S. 149, 156; *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. 171, L. R. 2 Q. B. 223, L. R. 1 Q. B. 130; *Senior v. Metropolitan R. Co.*, 2 H. & Colt. 258; *Chamberlain v. West End of London & C. P. R. Co.*, 2 B. & S. 605; *Broadbent v. Im-*

perial Gas Co., 7 De Gex, M. & G. 436, 456. See *ante*, p. 199.

³ *Penny’s Case*, 7 El. & B. 660.

⁴ *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. 171, L. R. 2 Q. B. 223, L. R. 1 Q. B. 130.

⁵ *Glover v. North Staffordshire R. Co.*, 16 Q. B. n. s. 912.

⁶ *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, L. R. 5 Exch. 221, L. R. 3 Exch. 306; *Stockport, T., & A. R. Co., In re*, 33 Law Jour. n. s. 251; *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. 171, L. R. 2 Q. B. 223, L. R. 1 Q. B. 130; *post*, p. 216. See *Patton v. Northern Cent. R. Co.*, 33 Pa. St. 426. As to injuries to mineral property, see *Smith v. Great Western R. Co.*, L. R. 3 App. Cas. 165.

the powers," have been thought by some judges to limit the compensation to injuries occasioned by the *construction* of the railway to the exclusion of those occasioned by its mere *use*; but other authorities have rejected this narrow construction.¹

The remedy provided by these statutes, while including only actionable injuries as an independent ground for compensation, has been considered not to extend to all such injuries. It does not apply to injuries from the company's works which, if committed without the authority conferred by statute, would be a public nuisance causing special damage and giving a private right of action. Thus, the land-owner was held not entitled to compensation where, without any of his land being occupied, a railway under due authority was constructed with gates across a public road, which was the principal access to his estate, thereby subjecting him to interruption in passing to and fro, to the frightening of his horses,² or to the loss of business and good-will.³ A distinction is taken in some cases between an injury to land which is within the statute and an injury to the owner in the way of inconveniences essentially personal in their nature, which is not within it.⁴ The statute remedy excludes actions at law for injuries to which it applies.⁵ It does not extend to any acts not authorized by the statute;⁶ or to injuries arising from the negligent or unskilful construction of the company's works, or from default in not complying with the statute.⁷

Damages, of what Time assessed. — The damages are assessed as of the time of the taking.⁸ In different jurisdictions the act of taking

¹ *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. 171, 186, 198, L. R. 2 Q. B. 223, L. R. 1 Q. B. 130; *Penny's Case*, 7 El. & B. 660.

² *Caledonian R. Co. v. Ogilvy*, 2 Macq. 229.

³ *Ricket v. Metropolitan R. Co.*, L. R. 2 H. L. 175, 5 B. & S. 149, 156; *Cameron v. Charing Cross R. Co.*, 19 C. B. N. s. 764, 16 C. B. N. s. 430. But see *Chamberlain v. West End of London & C. P. R. Co.*, 2 B. & S. 605; *Senior v. Metropolitan R. Co.*, 2 H. & Colt. 258.

⁴ *Chamberlain v. West End of London & C. P. R. Co.*, 2 B. & S. 617; *Ricket v. Metropolitan R. Co.*, L. R. 2 H. L. 175, 5 B. & S. 149, 156; *Hammer-*

smith & C. R. Co. v. Brand, L. R. 4 H. L. 171, 198.

⁵ *Vaughan v. Taff Vale R. Co.*, 5 H. & N. 679, 3 H. & N. 743; *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. 171, L. R. 2 Q. B. 223, L. R. 1 Q. B. 130; *ante*, p. 177.

⁶ *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643; *Broadbent v. Imperial Gas Co.*, 7 De Gex, M. & G. 436; *ante*, p. 179.

⁷ *Bagnall v. London & N. W. R. Co.*, 7 H. & N. 423; *Broadbent v. Imperial Gas Co.*, 7 De Gex, M. & G. 436; *ante*, p. 179.

⁸ *Parks v. Boston*, 15 Pick. 198; *Edmands v. Boston*, 108 Mass. 535; *Old Colony R. Co. v. Miller*, 125 Mass. 1; *Daniels v. C. I. & N. R. Co.*, 41 Iowa, 52; *Cook v. South Park Com'rs*, 61

is fixed at different stages in the proceedings for condemnation, — as at the time of the filing of the location in some public repository, as required by statute,¹ though on a failure to comply with the statute other acts may be deemed a taking;² the time of making the assessment or award;³ the filing or approval of the award;⁴ the commencement of proceedings to condemn;⁵ the filing of the petition to condemn;⁶ the beginning of the construction;⁷ and the trial of the question of damages on appeal.⁸

Measure of Damages. General Rule. Difference in Market Value of the Tract or Lot before and after the Taking. — Where the owner's whole tract or lot is taken, its market value at the time of the taking is the measure of compensation. Where only a part of the same tract or lot is taken, it must be treated not as a separate and independent piece, but in its relation to the part not taken. The injury to the remaining tract or lot may be far greater than the value of the strip appropriated for the location, if estimated by the proportion its superficial area bears to that of the whole tract or lot. The company can rarely consult individual convenience, or harmonize with the owner's plan of utilizing his estate, but it must determine its route and grade with reference chiefly

Ill. 115; *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 346; *Robbins v. Mil. & H. R. Co.*, 6 Wis. 636; *Isom v. Miss. Cent. R. Co.*, 36 Miss. 300; *Graham v. Connersville & N. C. J. R. Co.*, 36 Ind. 463.

¹ *Charlestown Branch R. Co. v. County Com'rs*, 7 Met. 78; *Davidson v. Boston & M. R.*, 3 Cush. 91; *Boynton v. Peterborough & S. R. Co.*, 4 Cush. 467; *Boston & M. R. v. Midland R. Co.*, 1 Gray, 340, 360; *Hazen v. Boston & M. R.*, 2 Gray, 574; *Whitman v. Boston & M. R.*, 7 Allen, 313, 326; *Ham v. Salem*, 100 Mass. 350; *Bemis v. Springfield*, 122 Mass. 110; *Old Colony R. Co. v. Miller*, 125 Mass. 1; *Morris & E. R. Co. v. Blair*, 1 Stock. 635; *Logansport, C., & S. R. Co. v. Buchanan*, 52 Ind. 163; *Lafayette, M., & B. R. Co. v. Murdock*, 68 Ind. 137. See *San Francisco & S. J. R. Co. v. Mahoney*, 29 Cal. 112; *ante*, p. 171.

² *Davidson v. Boston & M. R.*, 3 Cush. 91, 106; *Boston & P. R. Co. v. Midland R. Co.*, 1 Gray, 340, 361; *Troy & B. R. Co. v. Potter*, 42 Vt. 265.

³ *Winona & St. P. R. Co. v. Denman*, 10 Minn. 267; *Carli v. Stillwater & St. P. R. Co.*, 16 Minn. 260; *Warren v. St. P. & P. R. Co.*, 18 Minn. 384; *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 122; *Whitacre v. St. Paul & S. C. R. Co.*, 24 Minn. 311; *Metler v. Easton & A. R. Co.*, 8 Vroom, 222; *Dearborn v. Boston, C., & M. R.*, 24 N. H. 179.

⁴ *Driver v. Western Union R. Co.*, 32 Wis. 569; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538; *St. Joseph & D. R. Co. v. Orr*, 8 Kan. 419; *Neal v. Pittsburg & C. R. Co.*, 31 Pa. St. 19; *Beale v. Penn. R. Co.*, 86 Pa. St. 509; *Hudson River R. Co. v. Outwater*, 3 Sand. 689.

⁵ *Oregon & C. R. Co. v. Barlow*, 3 Oreg. 311.

⁶ *South Park Com'rs v. Dunlevy*, 91 Ill. 49.

⁷ *Indiana Cent. R. Co. v. Hunter*, 8 Ind. 74; *Logansport, C., & S. R. Co. v. Buchanan*, 52 Ind. 163.

⁸ *Arnold v. Covington & C. Bridge*, 1 Duvall, 372.

to its general scheme and the safe and profitable working of the railroad. The particular use, also, to which the part taken is to be devoted may interfere with the enjoyment and affect the value of the remaining land to a far greater degree than if the part taken was to be devoted to the ordinary purposes for which the whole tract was available before the taking. The owner may therefore be injured not merely by the subtraction of so many feet or acres from his estate, valued as if sold for an ordinary purpose and according to a plan devised for the most profitable use of the whole, but still more by the mode of the taking and its effect on the property which is left, viz., the way in which the railroad cuts the tract or lot, as diagonally, by a curve, or otherwise; the inconvenient shape in which the remaining part is left; the depth of excavations or height of embankments; the obstruction or entire interruption of access to public or private ways; the division of the tract or lot into different parts, so that persons or cattle cannot pass from one to the other, or, if at all, only with greater or less difficulty and danger; and the exposure of the owner's property, as buildings, forests, and crops, to particular injury from proximity to the railroad. Accordingly, in the interpretation of statutory and constitutional provisions which require compensation for the value of land taken, or for damages occasioned, or for the injurious affecting of property, or which use other like terms, the owner is held entitled not only to the value of the part applied to the exclusive use of the company, but to compensation for injury to the remaining portion of the same lot or tract. The general rule of damages, which covers the part taken and the injury to the remaining land, is, that the owner is entitled to the difference between the market value of the whole lot or tract before the taking, and the market value of what remains to him after such taking.¹ Damages to the owner's remaining property are recoverable, though not specially alleged.²

¹ *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423, 17 Hun, 344; *Furman Street Case*, 17 Wend. 649; *William & A. Streets*, *In re*, 19 Wend. 678, 690; *Troy & B. R. Co. v. Lee*, 13 Barb. 169; *Canandaigua & N. F. R. Co. v. Payne*, 16 Barb. 273; *Albany & N. R. Co. v. Lansing*, 16 Barb. 68; *Rochester & S. R. Co. v. Budlong*, 6 How. Pr. 467; *Utica, C., & S. R. Co., In re*, 56 Barb. 456; *Poughkeepsie & E. R. Co., In re*, 63 Barb. 151; *Black River & M. R. Co. v. Barnard*, 9 Hun, 104; *Prospect & C. I. R. Co., In re*, 13 Hun, 345, 16 Hun,

² *Drury v. Midland R. Co.*, 127 Mass. 571, 581. But see *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316.

Damages limited to the Particular Tract or Lot.—The owner's compensation for the injury to his remaining land is limited to the parcel or tract of which the land taken formed a part, and is not to be extended to other lots or estates of the same proprietor, which are separate and distinct from the one which has been in part appropriated to the public use.¹ But a mere nominal divi-

261; *Bloomfield & R. N. Gas Light Co. v. Calkins*, 1 Thomp. & C. 549; *Parks v. Boston*, 15 Pick. 198; *Meacham v. Fitchburg R. Co.*, 4 Cush. 291, 299; *Dwight v. Hampden*, 11 Cush. 201; *Dickenson v. Fitchburg*, 13 Gray, 546; *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *Edmonds v. Boston*, 108 Mass. 535; *Mount Washington Road Co., In re*, 35 N. H. 134; *Carpenter v. Landaff*, 42 N. H. 218; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Imlay v. Union Branch R. Co.*, 26 Conn. 249; *Schuylkill Nav. Co. v. Thoburn*, 7 S. & R. 411; *Schuylkill Nav. Co. v. Farr*, 4 W. & S. 362; *Searle v. Lackawanna & B. R. Co.*, 33 Pa. St. 57; *Patten v. Northern Cent. R. Co.*, 33 Pa. St. 426; *Watson v. Pittsburg & C. R. Co.*, 37 Pa. St. 469; *East Penn. R. Co. v. Heister*, 40 Pa. St. 53; *Brown v. Corey*, 43 Pa. St. 495; *East Penn. R. Co. v. Hottenstine*, 47 Pa. St. 28; *Harvey v. Lackawanna & B. R. Co.*, 47 Pa. St. 428; *Hornstein v. Atlantic & G. W. R. Co.*, 51 Pa. St. 87; *Western Penn. R. Co. v. Hill*, 56 Pa. St. 460; *Wilmington & R. R. Co. v. Stauffer*, 60 Pa. St. 374; *East Brandywine & W. R. Co. v. Rauck*, 78 Pa. St. 454; *Penn. & N. Y. R. & C. Co. v. Bunnell*, 81 Pa. St. 414; *Hoffer v. Penn. Canal Co.*, 87 Pa. St. 221; *Pittsburg, V., & C. R. Co. v. Bentley*, 88 Pa. St. 178; *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 92; *Cincinnati & S. R. Co. v. Longworth*, 30 Ohio St. 108; *Powers v. Hazelton & L. R. Co.*, 33 Ohio St. 429; *Sater v. Burlington & Mt. P. Plank R. Co.*, 1 Iowa, 386; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288, 309; *Fleming v. Chicago, D., & M. R. Co.*, 34 Iowa, 353; *Harrison v. Iowa Midland R. Co.*, 36 Iowa, 323; *Brooks v. Davenport & St. P. R. Co.*, 37 Iowa, 99; *White Water Valley R. Co. v. McClure*, 29 Ind. 536; *Grand Rapids & I. R. Co. v. Horn*, 41 Ind. 479; *Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328; *Baltimore, P., & C. R.*

Co. v. Lansing, 52 Ind. 229; *Wilson v. Rockford, R. I., & St. L. R. Co.*, 59 Ill. 273; *Galena & S. W. R. Co. v. Birkbeck*, 70 Ill. 208; *Chicago, M., & St. P. R. Co. v. Hall*, 90 Ill. 42; *Winona & St. P. R. Co. v. Denman*, 10 Minn. 267; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515; *Minnesota Valley R. Co. v. Doran*, 17 Minn. 188; *Lake Superior & M. R. Co. v. Greve*, 17 Minn. 322; *Colvill v. St. Paul & C. R. Co.*, 19 Minn. 283; *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500; *Scott v. St. Paul & C. R. Co.*, 21 Minn. 323; *Milwaukie & M. R. Co. v. Eble*, 4 Chandler (Wis.), 72; *Robbins v. Mil. & H. R. Co.*, 6 Wis. 636; *Snyder v. Western Union R. Co.*, 25 Wis. 60; *Bigelow v. West Wisconsin R. Co.*, 27 Wis. 478; *Driver v. Western Union R. Co.*, 32 Wis. 569; *Greenville & C. R. Co. v. Partlow*, 5 Rich. 428; *White v. Charlotte & S. C. R. Co.*, 6 Rich. 47; *Charleston & S. R. Co. v. Blake*, 12 Rich. 634; *Virginia & T. R. Co. v. Henry*, 8 Nev. 165; *Somerville & E. R. Co. v. Doughty*, 2 Zab. 495; *Harrison v. Young*, 9 Ga. 359, 364; *Missouri, K., & T. R. Co. v. Haines*, 10 Kan. 439; *Atchison, T., & S. F. R. Co. v. Blackshire*, 10 Kan. 477; *San Francisco, A., & S. R. Co. v. Caldwell*, 31 Cal. 367; *Woodfolk v. Nashville & C. R. Co.*, 2 Swan (Tenn.), 422; *Henderson & N. R. Co. v. Dickerson*, 17 B. Monr. 173; *Louisville & N. R. Co. v. Thompson*, 18 B. Monr. 735; *Richmond & L. Turnp. Road Co. v. Rogers*, 1 Duvall, 135; *Robb v. Maysville & Mt. S. T. R. Co.*, 3 Met. (Ky.) 117; *Quincy, M., & P. R. Co. v. Ridge*, 57 Mo. 599.

¹ *Fleming v. Chicago, D., & M. R. Co.*, 34 Iowa, 353; *New York Cent. & H. R. R. Co.*, 6 Hun, 149; *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Minnesota Valley R. Co. v. Doran*, 15 Minn. 230; *St. Paul & S. C. R. Co. v. Matthews*, 16 Minn. 341; *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 127; *St. Louis, V., & T. H. R. Co. v. Brown*, 58 Ill. 61.

sion into lots, or even a division by a highway, does not prevent the different lots being treated as an entirety, where they are still used together, and held for a common purpose.¹

The Owner's Fancy or Sentiment and the Company's Necessity not to be regarded in the Estimate.—The fair market value of the property taken, as it was at the time of the taking,—not the estimate derived from fancy, local attachment, or otherwise, which the owner may put upon it, or, on the other hand, the price which it would bring at a forced sale,—is the true measure of the owner's compensation.² Nor is the unwillingness of the owner to part with his property, or the necessity of the company,³ or the adaptation of the land to the purposes of the railroad,⁴ a proper element for consideration.

The Use for a Railroad to be considered.—The use to which the land taken is to be put, as for the running of railway trains, is to be regarded in determining the compensation;⁵ but the depreciation arising from annoyances which do not differ in kind from those suffered by the community in general is not to be taken into account.⁶

Particular Injuries.—In calculating the damages it has been customary to estimate particular injuries resulting to the own-

¹ *Keithsburg & E. R. Co. v. Henry*, 79 Ill. 290; *Robbins v. Mil. & H. R. Co.*, 6 Wis. 636; *Welch v. Mil. & St. P. R. Co.*, 27 Wis. 108; *Driver v. Western Union R. Co.*, 32 Wis. 569; *Renwick v. D. & N. W. R. Co.*, 49 Iowa, 664.

² *Giesy v. Cincinnati, W., & Z. R. Co.*, 4 Ohio St. 308, 331; *Somerville & E. R. Co. v. Doughty*, 2 Zab. 495; *Elizabeth & P. R. Co. v. Helm*, 8 Bush, 681; *Virginia & T. R. Co. v. Elliott*, 5 Nev. 358; *Woodfolk v. Nashville & C. R. Co.*, 2 Swan (Tenn.), 422; *Tufts v. Charlestown*, 4 Gray, 537; *Searle v. Lackawanna & B. R. Co.*, 33 Pa. St. 57.

³ *Henderson & N. R. Co. v. Dickerson*, 17 B. Monr. 173; *Virginia & T. R. Co. v. Elliott*, 5 Nev. 358; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288, 310.

⁴ *Stinson's Case*, 6 Northwest Rep. 784; *Boston, H., T., & W. R. Co. In re*, 10 N. Y. Week. Dig. 527.

⁵ *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Cleveland & P. R. Co. v. Ball*,

5 Ohio St. 568; *Atchison, T., & S. F. R. Co. v. Blackshire*, 10 Kan. 477; *Kucheman v. C. C. & D. R. Co.*, 46 Iowa, 366, 376; *Newby v. Platte County*, 25 Mo. 258; *Pacific R. Co. v. Chrystal*, 25 Mo. 544. A narrow construction of the terms of the General Railroad Act of New York excludes the consideration of injury caused to the remaining land by the use of the part taken for railroad purposes. *Albany Northern R. Co. v. Lansing*, 16 Barb. 68; *Troy & B. R. Co. v. Northern Turnp. Co.*, 16 Barb. 100; *Canandaigua & N. F. R. Co. v. Payne*, 16 Barb. 273; *Black River & M. R. Co. v. Barnard*, 9 Hun, 104; *Prospect Park & C. I. R. Co.*, 13 Hun, 345. But see a different interpretation of the act in *Utica, C., & S. R. Co. In re*, 56 Barb. 456; *Bloomfield & R. N. Gas Light Co. v. Calkins*, 1 Thomp. & C. 549.

⁶ *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10.

er's estate from the construction and working of the railroad. This may often, in practice, be a convenient way of reaching the result. The final test, however, where a part only is taken, is the difference between the market value of the whole before and the market value of the residue after the taking; and the owner is entitled to such difference and to no more.¹ If, after allowing him such difference, damage for specific causes of depreciation were awarded, he would receive double compensation.²

Expense of Fencing.—The expense of making and maintaining additional fences, which falls upon the land-owner in consequence of the construction of the railroad, is to be considered in the assessment of his damages;³ but not where the duty of fencing is imposed on the company,⁴ or where no fence will be required.⁵ Such expense, also, should be regarded only to the extent that it depreciates the value of the remaining land.⁶

Expense of Changes and New Erections by the Land-owner.—The owner is entitled to have included in his damages the depreciation in the value of his property, caused by the necessity of changes and erections which are required to restore the part not taken to a condition for use. As a mode of determining the depreciation, it

¹ *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288, 310. See *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *St. Louis, V., & T. H. R. Co. v. Mollett*, 59 Ill. 235.

² *Chicago, R. I., & P. R. Co. v. Carey*, 90 Ill. 514.

³ *Evansville, I., & C. S. L. R. Co. v. Fitzpatrick*, 10 Ind. 120; *White Water Valley R. Co. v. McClure*, 29 Ind. 536; *Montmorency Gravel Road Co. v. Rock*, 41 Ind. 263; *Grand Rapids & I. R. Co. v. Horn*, 41 Ind. 479; *Montmorency Gravel Road Co. v. Stockton*, 43 Ind. 328; *Baltimore, P., & C. R. Co. v. Lansing*, 52 Ind. 229; *Baltimore, P., & C. R. Co. v. Johnson*, 59 Ind. 188; *Tonica & P. R. Co. v. Unsicker*, 22 Ill. 221; *St. Louis, J., & C. R. Co. v. Mitchell*, 47 Ill. 165; *Peoria & R. I. R. Co. v. Birkett*, 62 Ill. 332; *Greenville & C. R. Co. v. Partlow*, 5 Rich. 428; *Eddings v. Seabrook*, 12 Rich. 504; *Watson v. Pittsburg & C. R. Co.*, 37 Pa. St. 469; *Louisville & N. R. Co. v. Glazebrook*, 1 Bush, 325; *Vandergrift v. Dela-*

ware R. Co., 2 Houst. 287; *Morss v. Boston & M. R.*, 2 Cush. 536; *Quimby v. Vt. Cent. R. Co.*, 23 Vt. 387; *Winona & St. P. R. Co. v. Denman*, 10 Minn. 267; *Raleigh & A. A. L. R. Co. v. Wicker*, 74 N. C. 220; *Sacramento Valley R. Co. v. Moffatt*, 6 Cal. 74; *California Pacific R. Co. v. Frisbie*, 41 Cal. 356. But see *Alabama & F. R. Co. v. Burkett*, 46 Ala. 569.

⁴ *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515. Where the company was held bound to maintain one half of the fence, it was held liable in the assessment to the cost of the other half which would fall on the owner. *Rensselaer & S. R. Co.*, 4 Paige, 553; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288, 305.

⁵ *North Eastern R. Co. v. Sineath*, 8 Rich. 185.

⁶ *Delaware, L., & W. R. Co. v. Burson*, 61 Pa. St. 369; *Penn. & N. Y. R. & C. R. Co. v. Bunnell*, 81 Pa. St. 414; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288, 310.

is proper to consider the expense which a prudent man would reasonably incur for that purpose, but not the expense which an owner, for personal reasons, might see fit to incur; and the allowance on account of such changes and erections, should not exceed the depreciation in the value of the property which results from the necessity of making them.¹ Likewise the cost of removing an obstruction which the land-owner may rightfully remove may be a proper mode of calculating his damages.² He is not entitled to the expense of removing personal property from the land taken.³

Exposure to Fire.—The exposure to fire communicated from the company's engines, involving imminent and appreciable danger to buildings situated on the residue of an estate which is in part taken, is to be considered in the assessment of damages, to the extent it diminishes the market value of the remaining land.⁴ A statute liability imposed on the company, irrespective of its care or negligence, for injuries from fire so communicated, does not exclude such exposure as an element of damage, although the owner's indemnity, secured by the statute, should be taken into account in estimating the depreciation caused by the proximity of the company's trains.⁵

¹ Chase v. Worcester, 108 Mass. 60; Buell v. Worcester, 119 Mass. 372; Bemis v. Springfield, 122 Mass. 110; Commonwealth v. Boston & M. R., 3 Cush. 25, 53; Presbrey v. Old Colony & N. R. Co., 103 Mass. 1, 5; St. Louis, V., & T. H. R. Co. v. Mollett, 59 Ill. 235; Price v. Mil. & St. P. R. Co., 27 Wis. 98; Estabrook v. Erie R. Co., 51 Barb. 95.

² Chicago, R. I., & P. R. Co. v. Carey, 90 Ill. 514.

³ Central Pacific R. Co. v. Pearson, 35 Cal. 247.

⁴ Utica, C., & S. R. Co., *In re*, 56 Barb. 456; Bloomfield & R. N. Gas Light Co. v. Calkins, 1 Thomp. & C. 549; Wilmington & R. R. Co. v. Stauffer, 60 Pa. St. 374; Phil. & R. R. Co. v. Yeiser, 8 Pa. St. 366; Somerville & E. R. Co. v. Doughty, 2 Zab. 495; Hatch v. Cincinnati & I. R. Co., 18 Ohio St. 92, 124; Proprietors of Locks & Canals v. Nashua & L. R. Co., 10 Cush. 385, 392; Snyder v. Western Union R. Co., 25 Wis. 60; Colvill v. St. Paul & C. R. Co., 19

Minn. 283; Curtis v. St. Paul, S., & T. F. R. Co., 20 Minn. 28; Oregon & C. R. Co. v. Barlow, 3 Oreg. 311; St. Louis & S. R. Co. v. Teters, 68 Ill. 144; Jones v. Chicago & I. R. Co., 68 Ill. 380; Swinney v. Ft. W., M., & C. R. Co., 59 Ill. 205; Small v. Chicago, R. I., & P. R. Co., 50 Iowa, 338; Lafayette, M., & B. R. Co. v. Murdock, 68 Ind. 137; Stockport, T., & A. R. Co., *In re*, 33 Law Journ. n. s. 251. Some authorities regard the risk as too uncertain and contingent to be considered. Sunbury & E. R. Co. v. Hummell, 27 Pa. St. 99; Lehigh Valley R. Co. v. Lazarus, 28 Pa. St. 203; Patten v. Northern Cent. R. Co., 33 Pa. St. 426; Union Village & J. R. Co., *In re*, 53 Barb. 457. See Fleming v. Chicago, D., & M. R. Co., 34 Iowa, 353.

⁵ Pierce v. Worcester & N. R. Co., 105 Mass. 199; Bangor & P. R. Co. v. McComb, 60 Me. 290; Adden v. White Mts. N. H. R. Co., 55 N. H. 413.

Rents. Interruption of Facilities of Communication.—Among elements of damage to be regarded are the difficulty of renting, and loss of rents,¹ and of crossing from one part to another of divided premises;² and the interruption of facilities of business and communication attached to the estate.³

Remote and Fanciful Injuries.—Loss of profits, business, and good-will are not substantive grounds for damages,⁴ nor are they to be specifically considered in estimating the injury caused by the taking of land;⁵ but evidence of the kind and amount of business done, and of the effect upon the business resulting from the railroad, has been admitted as one mode of calculating the injury.⁶

Mere inconveniences and annoyances, as the overlooking of the premises and obstruction of view,⁷ increased competition resulting from the railroad,⁸ the larger number of residents or visitors attracted to the locality by means of it, and interfering with the owner's privacy,⁹ are to be rejected. It is not easy to draw the line between inconveniences resulting from social progress to the community at large, though falling unequally on individuals, which are to be borne without compensation,¹⁰ and those which

¹ *Pittsburg, V., & C. R. Co. v. Rose*, 74 Pa. St. 362; *Henderson v. New York Cent. R. Co.*, 17 Hun, 344, 78 N. Y. 423.

² *Wilson v. Rockford, R. I., & St. L. R. Co.*, 59 Ill. 273; *Peoria, A., & D. R. Co. v. Sawyer*, 71 Ill. 361; *Chicago & I. R. Co. v. Hopkins*, 90 Ill. 316; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 127; *Pittsburg, V., & C. R. Co. v. Bentley*, 88 Pa. St. 178.

³ *Boston & W. R. Co. v. Old Colony R. Co.*, 12 Cush. 605, 3 Allen, 142; *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125, 132.

⁴ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385, 389; *Tinsman v. Belvidere Del. R. Co.*, 2 Dutcher, 148, 171; *Troy & B. R. Co. v. Northern Turnp. Co.*, 16 Barb. 100; *Mount Washington Road, In re*, 35 N. H. 134; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504, 527. See *Ricket v. Metropolitan R. Co.*, L. R. 2 H. L. 175, 5 B. & S. 149; *Cameron v. Charing Cross R. Co.*, 19 C. B. N. S. 764, 16 C. B. N. S. 430; *Chamberlain v. West End of London & C. P. R. Co.*, 2 B. & S. 605, 617; *Senior v. Metropolitan R. Co.*, 2 H. & C. 258.

⁵ *Eddings v. Seabrook*, 12 S. C. 504; *Canandaigua & N. F. R. Co. v. Payne*, 16 Barb. 273; *Union Village & J. R. Co. v. Aikin*, 53 Barb. 457; *Edmands v. Boston*, 108 Mass. 535; *Cobb v. Boston*, 109 Mass. 438.

⁶ *Boston & W. R. Co. v. Old Colony R. Co.*, 12 Cush. 605, 3 Allen, 142; *Edmands v. Boston*, 108 Mass. 535; *Driver v. Western Union R. Co.*, 32 Wis. 569; *Western Penn. R. Co. v. Hill*, 56 Pa. St. 460; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 127; *Lafayette, M., & B. R. Co. v. Murdock*, 68 Ind. 137. But see *Whitman v. Boston, & M. R.*, 3 Allen, 133, 7 Allen, 313; *St. Louis, V., & T. H. R. Co. v. Capps*, 67 Ill. 607, 72 Ill. 188.

⁷ *Penny's Case*, 7 El. & Bl. 660.

⁸ *Harvey v. Lackawanna & B. R. Co.*, 47 Pa. St. 428; *Adden v. White Mts. R. Co.*, 55 N. H. 413; *Mount Washington Road Co., In re*, 35 N. H. 134, 146.

⁹ *Patten v. Northern Cent. R. Co.*, 33 Pa. St. 426; *First Parish of Woburn v. Middlesex*, 7 Gray, 106. See *ante*, p. 208.

¹⁰ *Patten v. Northern Cent. R. Co.*, 33 Pa. St. 426, 433, 434.

are direct and peculiar to an individual, and entitling him to reimbursement for his private loss. But the authorities tend to this result, — that inconveniences not involving any immediate physical injury, such as smoke, vibration, and noise, caused by passing trains, are not an independent ground for compensation; but so far as they arise from the taking of a person's property, and affect it in a direct and peculiar way, they may, when a part of his lot or tract is taken, be admitted in estimating the depreciation in the value of his entire estate.¹

Present Use of the Land, and Capacity for other Uses. — The particular use to which the land is applied at the time of the taking is not the test of its value, but its availability for any valuable or beneficial uses to which it would be likely to be put by men of ordinary prudence, should be taken into account.² It has been well said that the compensation "is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future."³ But merely possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded.⁴ It is proper

¹ *Bangor & P. R. Co. v. McComb*, 60 Me. 290; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10; *Struthers v. Dunkirk, W., & P. R. Co.*, 87 Pa. St. 282; *Bordentown & S. A. Turnp. Co. v. Camden & A. R. Co.*, 2 Harrison, 314; *Tinsman v. Belvidere Del. R. Co.*, 2 Dutcher, 148, 171; *New York Cent. & H. R. R. Co., In re*, 15 Hun, 63; *Chicago, M., & St. P. R. Co. v. Hall*, 90 Ill. 42; *Hammer-smith & C. R. Co. v. Brand*, L. R. 4 H. L. 171, L. R. 2 Q. B. 223, L. R. 1 Q. B. 130; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 Exch. 221; *Stockport, T., & A. R. Co., In re*, 33 Law Journ. N. S. 251; *ante*, pp. 198, 208.

² *Furman Street, In re*, 17 Wend. 649, 669, 670; *New York Cent. & H. R. R. Co., In re*, 6 Hun, 149; *Trustees of College Point v. Dennett*, 5 Thomp. & C. 217; *Somerville & E. R. Co. v. Doughty*, 2 Zab. 495; *First Parish in Woburn v. Middlesex*, 7 Gray, 106; *Dickenson v. Fitchburg*, 13 Gray, 546; *Dwight v. Hampden*,

11 Cush. 201; *Eastern R. Co. v. Boston & M. R.*, 111 Mass. 125, 132; *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544; *Gardner v. Brookline*, 127 Mass. 358, 362; *Drury v. Midland R. Co.*, 127 Mass. 571, 582; *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio St. 169; *Cincinnati & S. R. Co. v. Longworth*, 30 Ohio St. 108; *Colvill v. St. Paul & C. R. Co.*, 19 Minn. 283; *Haslam v. Galena & S. W. R. Co.*, 64 Ill. 353; *South Park Com'rs v. Dunlevy*, 91 Ill. 49; *Young v. Harrison*, 17 Ga. 30; *Regina v. Brown*, L. R. 2 Q. B. 680. Its use for the sale of intoxicating liquors is not a reason for reducing the damages. *Brown v. Providence, W., & B. R. Co.*, 5 Gray, 35.

³ *Boom Co. v. Patterson*, 98 U. S. 403, 408.

⁴ *Searle v. Lackawanna & B. R. Co.*, 33 Pa. St. 57; *Dorlan v. East Brandywine & W. R. Co.*, 46 Pa. St. 520; *Fleming v. Chicago, D., & M. R. Co.*, 34 Iowa, 353; *Worcester v. Great Falls Man. Co.*, 41 Me. 159; *Lake Shore & M. S. R. Co. v. Cincinnati, S., & C. R. Co.*, 30 Ohio St. 604, 624; *Powers v. Hazelton & L. R. Co.*,

to put in evidence the present, but not the probable future use of the land, or the intentions of the owner as to such use.¹

Damages to the Company for Highway and Railroad Crossings.—Where a railroad company is entitled under statutes to compensation for other railroads or for highways being laid across its right of way, the damages may include the value of the title or interest taken, and the cost of changes and new structures required by reason of the crossing, but not the inconvenience and interruption occasioned to its business or the increased expense of complying with police regulations imposed by the State for the public convenience and safety.² Benefits arising from a probable increase of travel on the railroad to be caused by the highway, are not to be deducted from the company's damages.³ When a street-railway company is entitled to receive compensation from another company, which has been authorized to run cars upon its tracks, the damages are to include compensation for the use and wear of its tracks, but not for the diminution in its profits or in the value of its franchise.⁴

A Proper Construction to be assumed in the Assessment.—Damages are to be assessed upon the assumption that the road will be constructed with due care and skill, and with proper precautions necessary to prevent unnecessary injury to land-owners.⁵

Damages by Agreement.—The parties may settle by agreement the amount of damages, notwithstanding a mode is provided by statute.⁶ A release of damages, caused by the laying out and

33 Ohio St. 429; *Burt v. Wigglesworth*, 117 Mass. 302; *Gardner v. Brookline*, 127 Mass. 358; *Selma, R., & D. R. Co. v. Keith*, 53 Ga. 178.

¹ *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 127; *Pinkham v. Chelmsford*, 109 Mass. 225; *Fairbanks v. Fitchburg*, 110 Mass. 224.

² *Old Colony & F. R. R. Co. v. Plymouth County*, 14 Gray, 155; *Mass. Cent. R. Co. v. Boston, C., & F. R. Co.*, 121 Mass. 124; *Boston & W. R. Co. v. Old Colony R. Co.*, 12 Cush. 605; *Lake Shore & M. S. R. Co. v. Cincinnati, S., & C. R. Co.*, 30 Ohio St. 604; *ante*, p. 196. See *Lockport & B. R. Co., In re*, 77 N. Y. 557, 15 Hun, 365, 19 Hun, 38; *Boston, H. T.,*

& W. R. Co., In re, 10 N. Y. Week. Dig. 527, 58 How. Pr. 167; *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. 219; *White River Turnp. Co. v. Vt. Cent. R. Co.*, 21 Vt. 590.

³ *Old Colony & F. R. R. Co. v. Plymouth County*, 14 Gray, 155; *Boston & M. R. v. Middlesex County*, 1 Allen, 324.

⁴ *Metropolitan R. Co. v. Highland St. R. Co.*, 118 Mass. 290.

⁵ *Dearborn v. Boston, C., & M. R. Co.*, 24 N. H. 179; *Pittsburg, Ft. W., & C. R. Co. v. Gilleland*, 56 Pa. St. 445; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538; *ante*, p. 179.

⁶ *La Crosse & M. R. Co. v. Seeger*, 4 Wis. 268.

construction of the railroad, is presumed to include those only which are recoverable under the special remedy.¹

Improvements while Proceedings are pending, or during an Illegal Possession. — The owner is entitled to the value of his land in its improved condition at the time of the taking, although he has made improvements with knowledge of the contemplated railroad.² If the company has, with his consent or under color of right, as in the case of proceedings found afterwards to be irregular, made an entry, and laid tracks, or constructed other works which are fixtures, the owner is only entitled to the value irrespective of such improvements.³ If its entry and possession are altogether wrongful, he has been held entitled to the increased value derived from its works;⁴ but this claim cannot be sustained on the ground of his right to just compensation, and should be rejected where the company's trespass is merely technical, and in no respect wanton and malicious.⁵ The laying of the rails or similar structures differs essentially from the ordinary transaction of placing fixtures on real estate, and is not governed by the same rules.⁶ The company can enter to remove rails which it has laid under a license;⁷ but not where it has laid them without lawful authority, as when it has failed to pay compensation and file a location, as required by law.⁸

The owner is not entitled to the increase of value derived from the contemplated railroad as a part of his damages.⁹

¹ *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504. As to fraud in procuring a release of damages, see *Ohio & M. R. Co. v. Bath*, 11 Ind. 538.

² *Driver v. Western Union R. Co.*, 32 Wis. 569; *Wall Street, In re*, 17 Barb. 617; *State v. Carragan*, 7 Vroom, 52; *Sherwood v. St. P. & C. R. Co.*, 21 Minn. 122.

³ *Emerson v. Western Union R. Co.*, 75 Ill. 176; *Mitchell v. Illinois & St. L. R. Co.*, 85 Ill. 566; *North Hudson County R. Co. v. Booraem*, 1 Stewart (N. J.), 450; *Price v. Weehawken Ferry Co.*, 4 Stewart (N. J.), 31; *Miss. & T. R. Co. v. Devaney*, 42 Miss. 555; *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28.

⁴ *Graham v. Connersville & N. C. J. R. Co.*, 36 Ind. 463; *Long Island R. Co., In re*, 6 Thomp. & C. 298; *United States v. Land in Monterey County*, 47 Cal. 515.

⁵ *California P. R. Co. v. Armstrong*, 46 Cal. 85; *Daniels v. C., I., & N. Co.*, 41

Iowa, 52; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 538; *Morgan v. Chicago & N. R. Co.*, 39 Mich. 675.

⁶ *Justice v. Nesquehoning Valley R. Co.*, 87 Pa. St. 28; *Northern Cent. R. Co. v. Canton Co.*, 30 Md. 347; *Wagner v. Cleveland & T. R. Co.*, 22 Ohio St. 563. But see *Price v. Weehawken Ferry Co.*, 4 Stewart (N. J.), 31.

⁷ *Northern Central R. Co. v. Canton Co.*, 30 Md. 347; *Dietrich v. Murdock*, 42 Mo. 279.

⁸ *Meriam v. Brown*, 128 Mass. 391.

⁹ *New Orleans, O., & G. W. R. Co. v. Lagarde*, 10 La. An. 150; *Sater v. Burlington & Mt. P. Plank Road Co.*, 1 Iowa, 386; *Elizabethtown & P. R. Co. v. Helm*, 8 Bush, 681; *Carli v. Stillwater & St. P. R. Co.*, 16 Minn. 260. But see, as to the increase resulting from the public expectation of the improvement, *Cobb v. Boston*, 112 Mass. 181, 183.

Interest.—Interest from the time of the taking, or the time when the land-owner became entitled to the compensation, to the time of the award or verdict, is to be added to the amount of damages found due to the party,¹ even though the amount may have been deposited in court,² or the land-owner has not pressed his suit.³ The land-owner is entitled to interest from such time, although he remains, by the permission of the company, in possession for some time after.⁴ But interest is not recoverable for the period when the company could not lawfully have had possession.⁵ The verdict is presumed to include interest, when the jury were instructed that the plaintiff was entitled to it, and is not to be added in the judgment to the verdict.⁶

Privileges and Reservations to the Land-owner, when to be deducted.—The tribunal for assessing the damages must, unless otherwise provided by statute, assess them only in money, and cannot reduce them by imposing conditions on the company and reserving easements, like rights of way across the railroad, to the land-owner,⁷ or by taking into account contemplated improvements and erections which the company is not bound by agreement or statute to make, or favors and privileges which

¹ *Parks v. Boston*, 15 Pick. 198, 203; *Commonwealth v. Boston & M. R.*, 3 Cush. 25; *Whitman v. Boston & M. R.*, 7 Allen, 313, 326; *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *Reed v. Hanover Branch R. Co.*, 105 Mass. 303; *Edmands v. Boston*, 108 Mass. 535; *Kidder v. Oxford*, 116 Mass. 165; *Old Colony R. Co. v. Miller*, 125 Mass. 1; *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544; *Bangor & P. R. Co. v. McComb*, 60 Me. 290, 302; *Missouri River, Ft. S., & G. R. Co. v. Owen*, 8 Kan. 409; *Phil., W., & B. R. Co. v. Gesner*, 20 Pa. St. 240; *Delaware, L., & W. R. Co. v. Burson*, 61 Pa. St. 369; *Metler v. Easton & A. R. Co.*, 8 Vroom, 222; *Knauff v. St. Paul, S., & T. F. R. Co.*, 22 Minn. 173; *Rhys v. Dare Valley R. Co.*, L. R. 19 Eq. Cas. 93. See *Illinois & St. L. R. Co. v. McClintock*, 68 Ill. 296; *March v. Portsmouth & C. R. Co.*, 19 N. H. 372; *Concord R. Co. v. Greely*, 23 N. H. 237; *Shattuck v. Wilton R.*, 23 N. H. 269; *Cook v. South Park Com'rs*, 61 Ill. 115.

² *Atlantic & G. W. R. Co. v. Koblenz*, 21 Ohio St. 384.

³ *Drury v. Midland R. Co.*, 127 Mass. 571, 585.

⁴ *Philadelphia v. Dyer*, 41 Pa. St. 463; *Old Colony R. Co. v. Miller*, 125 Mass. 1, 5. See *Warren v. St. Paul & P. R. Co.*, 21 Minn. 424.

⁵ *South Park Com'rs v. Dunlevy*, 91 Ill. 49.

⁶ *Diedrich v. Northwestern Union R. Co.*, 47 Wis. 662. But see *Warren v. St. Paul & P. R. Co.*, 21 Minn. 424; *Whitacre v. St. Paul & S. C. R. Co.*, 24 Minn. 311.

⁷ *Hill v. Mohawk & H. R. Co.*, 7 N. Y. 152, 5 Denio, 206; *Winchester & P. R. Co. v. Washington*, 1 Rob. (Va.) 67; *Chesapeake & O. R. Co. v. Patton*, 6 W. Va. 147; *Chesapeake & O. R. Co. v. Halstead*, 7 W. Va. 301; *Central Ohio R. Co. v. Holler*, 7 Ohio St. 220; *Chicago, M., & St. P. R. Co. v. Melville*, 66 Ill. 329; *Vandegrift v. Delaware R. Co.*, 2 Houst. 287; *Bourgoin v. La Compagnie*, L. R. 5 App. Cas. 881. See *Chapin v. Boston & P. R. Co.*, 6 Cush. 422; *Brown v. Worcester*, 13 Gray, 31.

it may voluntarily grant to the land-owner,¹ even though he may have already used them.² The tribunal is sometimes authorized by statute to impose such conditions, and, when so imposed, their due performance is to be assumed and allowed for in the assessment of the damages;³ but it cannot, without special statute authority, impose obligations on the land-owner.⁴

Deduction of Benefits. — The “just compensation” secured by the Constitution need not exceed the injury suffered. These terms are appropriate only to an injury or loss, and where none is found finally to occur, on a comparison of advantages and disadvantages, a payment of money is not required by any rule of justice. The cost of public improvements should not be swollen by the exactions of citizens who have already received full satisfaction in the peculiar and direct increase of the value of their property caused by such improvements. Accordingly, in determining the amount of the compensation, the benefits accruing to the owner’s remaining property may be deducted from the sum of his damages, which is computed upon the value of the property appropriated and the injury to his remaining estate.⁵ In some jurisdictions they have been held to be the subject of deduction even when common to the community, and not peculiar to the individual.⁶

The terms “just compensation,” used in constitutions, have, on the theory that money only is intended by them, been held in some jurisdictions to exclude an allowance for benefits as a deduction from the value of the land taken, though admitting them

¹ *Ham v. Salem*, 100 Mass. 350; *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *Drury v. Midland R. Co.*, 127 Mass. 571; *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 142; *Pittsburg, V., & C. R. Co. v. Rose*, 74 Pa. St. 362.

² *Old Colony R. Co. v. Miller*, 125 Mass. 1.

³ *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *Morss v. Boston & M. R.*, 2 Cush. 536.

⁴ *Jefferis v. Phil., W., & B. R. Co.*, 3 *Houst.* 447.

⁵ *Symonds v. Cincinnati*, 14 Ohio, 147; *Kramer v. Cleveland & P. R. Co.*, 5 Ohio St. 140; *Columbus, P., & I. R. Co. v. Simpson*, 5 Ohio St. 251; *Malone v. Toledo*, 34 Ohio St. 541, 28 Ohio St. 643; *McIntire v. State*, 5 Blackf. 384;

Indiana Cent. R. Co. v. Hunter, 8 Ind. 74; *Holton v. Milwaukee*, 31 Wis. 27; *Nichols v. Bridgeport*, 23 Conn. 189; *New Orleans, O., & G. W. R. Co. v. Lagarde*, 10 La. An. 150; *Rexford v. Knight*, 15 Barb. 627; *Newby v. Platte County*, 25 Mo. 258; *Louisiana & F. Plank Road Co. v. Pickett*, 25 Mo. 535; *Penn. R. Co. v. Heister*, 8 Pa. St. 445; *Whiteman v. Wilmington & S. R. Co.*, 2 *Harring. (Del.)* 514.

⁶ *California P. R. Co. v. Armstrong*, 46 Cal. 85; *San Francisco, A., & S. R. Co. v. Caldwell*, 31 Cal. 367; *Alton & S. R. Co. v. Carpenter*, 14 Ill. 190; *New Orleans P. R. Co. v. Gay*, 31 La. An. 430. See *Washington Cemetery v. Prospect Park & C. I. R. Co.*, 68 N. Y. 591.

as an offset to the injury done to the owner's remaining land.¹ But a distinction between his right to the possession of the piece occupied exclusively for the public use, and his right to be protected in the enjoyment of his remaining land, does not seem substantial.² These terms have been sometimes held to prohibit the offset of benefits even as against damages to the remaining land.³

The deduction of benefits in the assessment of damages is prohibited by the constitutions of some States, — as Ohio,⁴ Kansas,⁵ and Alabama;⁶ and by statutes in other States.⁷

The Deduction limited to Peculiar Benefits. — The benefits which may be considered in reduction of the damages are generally confined to such as are direct and peculiar to the owner, excluding those which he shares with other members of the community whose property is not taken. This rule prevails where the statute expressly authorizes the deduction of benefits, or, being silent on the point, is held not to prohibit it.⁸ The exclusion of common

¹ *Sutton v. Louisville*, 5 Dana, 28; *Jacob v. Louisville*, 9 Dana, 114; *Henderson & N. R. Co. v. Dickerson*, 17 B. Monr. 173; *Louisville & N. R. Co. v. Thompson*, 18 B. Monr. 735; *Elizabethtown & P. R. Co. v. Helm*, 8 Bush, 681; *New Orleans, O., & G. W. R. Co. v. Lagarde*, 10 La. An. 150; *Vicksburg, S., & T. R. Co. v. Calderwood*, 15 La. An. 481; *Jones v. Wills Valley R. Co.*, 30 Ga. 43; *Atlanta v. Central R. & B. Co.*, 53 Ga. 120; *Hayes v. Ottawa, O., & F. R. V. R. Co.*, 54 Ill. 373; *Wilson v. Rockford, R. I., & St. L. R. Co.*, 59 Ill. 273; *Peoria, P., & J. R. Co. v. Laurie*, 63 Ill. 264; *Carpenter v. Jennings*, 77 Ill. 250; *Todd v. Kankakee & I. R. R. Co.*, 78 Ill. 530; *Oregon Cent. R. Co. v. Wait*, 3 Oreg. 91; *Woodfolk v. Nashville & C. R. Co.*, 2 Swan, 422; *East Tenn. & V. R. Co. v. Love*, 3 Head, 63; *Paducah & M. R. Co. v. Stovall*, 12 Heisk. 1; *Miss. R. Co. v. McDonald*, 12 Heisk. 54; *Mitchell v. Thornton*, 21 Gratt. 164; *Milwaukie & M. R. Co. v. Eble*, 4 Chandler (Wis.), 72; *Buffalo Bayou, B., & C. R. Co. v. Ferris*, 26 Tex. 588; *Paris v. Mason*, 37 Tex. 447; *Shipley v. Balt. & P. R. Co.*, 34 Md. 336.

² *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515, 538.

³ *Brown v. Beatty*, 34 Miss. 227; *Isom v. Miss. Cent. R. Co.*, 36 Miss. 300; *Penrice v. Wallis*, 37 Miss. 172.

⁴ *Giesy v. Cincinnati, W., & Z. R. Co.*, 4 Ohio St. 308; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *Little Miami R. Co. v. Collett*, 6 Ohio St. 182.

⁵ *St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 419; *Hunt v. Smith*, 9 Kan. 137; *Atchison, T., & S. F. R. Co. v. Blackshire*, 10 Kan. 477.

⁶ *Alabama & F. R. Co. v. Burkett*, 46 Ala. 569, 579.

⁷ *McMahon v. Cincinnati, & C. S. L. R. Co.*, 5 Ind. 413; *Newcastle & R. Co. v. Brumback*, 5 Ind. 543; *Evansville, I., & C. S. L. R. Co. v. Fitzpatrick*, 10 Ind. 120; *White Water Valley R. Co. v. McClure*, 29 Ind. 536; *Grand Rapids & I. R. Co. v. Horn*, 41 Ind. 479; *Swayze v. New Jersey Midland R. Co.*, 7 Vroom, 295.

⁸ *Meacham v. Fitchburg R. Co.*, 4 Cush. 291; *Upton v. South Reading Branch R. Co.*, 8 Cush. 600; *Davis v. Charles River Branch R. Co.*, 11 Cush. 506; *Dickenson v. Fitchburg*, 13 Gray 546; *Whitman v. Boston & M. R.*, 7 Allen, 113, 3 Allen, 133; *Allen v. Charlestown*, 109 Mass. 243; *Upham v. Worcester*, 113 Mass. 97; *Parks v. Hampden*

benefits is put on the ground that their admission would impose on certain individuals unequal burdens for the common good, by exacting contributions only from those whose property has been taken, and relieving others who are to derive an equal advantage from the public work. To this reason may be added another, — that common benefits are of such a general and indefinite character as not to admit of any certain or approximate calculation.

The distinction between common and peculiar benefits is not clearly drawn. The rise of real estate in a town or place, consequent upon new facilities of communication, which tend to increase its population, attract business, and promote its prosperity, is clearly a general advantage. The distinction operates chiefly to exclude as an offset to a land-owner's damages the consideration of the increased salable value of his real estate, so far as it is derived from such additional facilities, conveniences, and attractions.¹ But if the benefit is particular in its nature and effect, it is the subject of deduction, although several or many share in it. Thus, if the construction of a railway should cause the draining of land owned in severalty by a number of proprietors, the benefit to each estate would be peculiar and direct, and should be estimated in reduction of the damages.² Other illustrations of such a benefit, even when shared by other persons, are the location of a railway station on or near the land-owner's lot;³ the filling up of a canal in which he had an interest, with a benefit

County, 120 Mass. 395; Mount Washington Road, *In re*, 35 N. H. 134; Carpenter v. Landuff, 42 N. H. 218; Adden v. White Mts. N. H. R., 55 N. H. 413; Nicholson v. New York & N. H. R. Co., 22 Conn. 74, 88; Nichols v. Bridgeport, 23 Conn. 189; Hornstein v. Atlantic & G. W. R. Co., 51 Pa. St. 87; Newby v. Platte County, 25 Mo. 258, 275; Louisiana & F. Plank R. Co. v. Pickett, 25 Mo. 535; Pacific R. Co. v. Chrystal, 25 Mo. 544; St. Louis & St. J. R. Co. v. Richardson, 45 Mo. 466; Lee v. Tebo & N. R. Co., 53 Mo. 178; Quincy, M., & P. R. Co. v. Ridge, 57 Mo. 599; Hosher v. Kansas City, St. J., & C. B. R. Co., 60 Mo. 303; Peoria, P., & J. R. Co. v. Black, 58 Ill. 33; Keithsburg & E. R. Co. v. Henry, 79 Ill. 290; Winona & St. P. R. Co. v. Waldron, 11 Minn. 515; Minnesota Cent. R. Co. v. McNamara, 13 Minn. 508; Carli v. Stillwater & St. P. R. Co., 16 Minn. 260;

Minnesota Valley R. Co. v. Doran, 17 Minn. 188; Weir v. St. Paul, S., & T. F. R. Co., 18 Minn. 155; James River & K. R. Co. v. Turner, 9 Leigh, 313; Chesapeake & O. R. Co. v. Tyree, 7 W. Va. 693; Raleigh & A. A. L. R. Co. v. Wicker, 74 N. C. 220; Shipley v. Balt. & P. R. Co., 34 Md. 336; Vicksburg, S., & T. R. Co. v. Calderwood, 15 La. An. 481; Senior v. Metropolitan R. Co., 2 H. & Colt. 258.

¹ Meacham v. Fitchburg R. Co., 4 Cush. 291, 297; Upton v. South Reading Branch R., 8 Cush. 600; Allen v. Charlestown, 109 Mass. 243, 246; Adden v. White Mts. N. H. R., 55 N. H. 413.

² Donovan v. Springfield, 125 Mass. 371.

³ Shattuck v. Stoneham Branch R., 6 Allen, 115; Brown v. Providence, W., & B. R. Co., 5 Gray, 35; Hayes v. Ottawa, O., & F. R. V. R. Co., 54 Ill. 373.

accruing to his estate;¹ and a more convenient access or wider front.²

The Deduction limited to the Particular Tract which is in part taken. — The deduction is also limited to benefits affecting the same tract or lot, to the exclusion of those which affect only other separate and distinct property of the same owner.³ In taking additional land after the original construction of the railroad, no deduction is to be made for an appreciation in value, caused by such original construction.⁴

A benefit which is only personal and not affecting the land itself, as the owner's profits in selling materials to the company is not to be deducted.⁵

Evidence. Sales of Other Similar Land. — Actual sales of other similar land in the vicinity, made near the time at which the value of the land taken is to be determined, are admissible as evidence to determine the amount of compensation; but such other land, to be a standard of comparison, must be similar in character and situation, and the sale must not have been remote in time.⁶ Whether there is the required similarity in the land, and nearness in time, so as to make the evidence admissible, is largely in the discretion of the officer or judge presiding.⁷ His discretion,

¹ *Whitman v. Boston & M. R. Co.*, 3 Allen, 133, 7 Allen, 313. See *Milwaukie & M. R. Co. v. Eble*, 4 Chandler (Wis.), 72.

² *Allen v. Charlestown*, 109 Mass. 243; *Hilbourne v. Suffolk*, 120 Mass. 398.

³ *Meacham v. Fitchburg R. Co.*, 4 Cush. 291, 298; *St. Louis. V., & T. H. R. Co. v. Brown*, 58 Ill. 61; *Todd v. Kankakee & I. R. Co.*, 78 Ill. 530; *Bufalo Bayou, B., & C. R. Co. v. Ferris*, 26 Tex. 588; *Paducah & M. R. Co. v. Stovall*, 1 Heisk. 1; *Philadelphia & R. R. Co. v. Gilson*, 8 Watts, 243; *Harrisburg & P. R. Co. v. Moore*, 4 Week. Not. Cas. 532.

⁴ *Virginia & T. R. Co. v. Lovejoy*, 8 Nev. 100.

⁵ *Minnesota Valley R. Co. v. Doran*, 17 Minn. 188. As to a benefit derived from the removal of a cemetery caused by the railroad, see *Minn. Cent. R. Co. v. McNamara*, 13 Minn. 508.

⁶ *Wyman v. Lexington & W. C. R.*

Co., 13 Met. 316; *Boston & W. R. Co. v. Old Colony & F. R. R. Co.*, 3 Allen, 142; *Paine v. Boston*, 4 Allen, 168; *Benham v. Dunbar*, 103 Mass. 365; *Edmonds v. Boston*, 108 Mass. 535; *March v. Portsmouth & C. R. Co.*, 19 N. H. 372; *Concord R. Co. v. Greely*, 23 N. H. 237; *King v. Iowa Midland R. Co.*, 34 Iowa, 458. *Contra*, *East Penn. R. Co. v. Hiesler*, 40 Pa. 53; *Pittsburg, V., & C. R. Co. v. Rose*, 74 Pa. 362; *Penn. & N. Y. R. & C. Co. v. Bunnell*, 81 Pa. 414; *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Stinson's Case*, 6 Northwest. Rep. 786.

⁷ *Shattuck v. Stoneham Branch R. Co.*, 6 Allen, 115; *Presbrey v. Old Colony & F. R. R. Co.*, 103 Mass. 1; *Benham v. Dunbar*, 103 Mass. 365; *Green v. Fall River*, 113 Mass. 262; *Gardner v. Brookline*, 127 Mass. 358, 363; *Montclair R. Co. v. Benson*, 7 Vroom, 557; *Stinson's Case*, 6 Northwest. Rep. 784.

however, is not unlimited, and if he admits evidence of other sales of land so dissimilar in position and capacity for use, or of sales so remote in time that they could afford no just measure of the value of the land taken, or if he rejects evidence of sales which clearly ought to have been admitted, a new trial will be granted.¹ Voluntary sales of similar land in the vicinity, made to the company, are admissible to prove the value of the land in question; but an amount fixed by a jury or arbitrators, or paid compulsorily,² or as a compromise, or by agreement with the owner as a gross sum both for the land purchased and damages to the residue,³ is to be excluded as evidence. The price paid by the owner for his land, though open to explanation, is admissible against him.⁴

Offers and Admissions.—Offers made by third parties for the land in controversy are not admissible to prove its value;⁵ nor are they admissible when made by the company by way of compromise, or in settlement of damages.⁶ Such offers for the purchase of other lands, similarly situated, or agreements for their purchase, which have not been carried into effect, are also to be rejected.⁷ The owner's declarations and admissions as to the value of his land are admissible against him.⁸

Opinions as to Value.—The opinions of witnesses, conversant with the value of the land taken, are admissible to prove such value; and, where a part only is taken, to prove the value of the whole before the taking, and the value of what remains after the taking.⁹ They are admissible where a lessee petitions for

¹ *Chandler v. Jamaica Pond Aqueduct Co.*, 122 Mass. 305; *Paine v. Boston*, 4 Allen, 169.

² *Wyman v. Lexington & W. C. R. Co.*, 13 Met. 316, 326; *White v. Fitchburg R. Co.*, 4 Cush. 440; *Bemis v. Springfield*, 122 Mass. 110.

³ *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1; *Cobb v. Boston*, 112 Mass. 181.

⁴ *Ham v. Salem*, 100 Mass. 350.

⁵ *Dickenson v. Fitchburg*, 13 Gray, 546; *Fowler v. County Com'rs*, 6 Allen, 92; *Drury v. Midland R. Co.*, 127 Mass. 571, 582; *St. Joseph & D. C. R. Co. v. Orr*, 8 Kan. 419; *Selma, R., & D. R. Co. v. Keith*, 53 Ga. 178.

⁶ *Upton v. South Reading Branch R.*

Co., 8 Cush. 600; *Davis v. Charles River Branch R. Co.*, 11 Cush. 506.

⁷ *Davis v. Charles River Branch R. Co.*, 11 Cush. 506; *Chapin v. Boston & P. R. Co.*, 6 Cush. 422; *Winnisimmet Co. v. Grueby*, 111 Mass. 543; *Montclair R. Co. v. Benson*, 7 Vroom, 557; *Lehmiche v. St. Paul, S., & T. F. R. Co.*, 19 Minn. 464; *Concord R. Co. v. Greely*, 23 N. H. 237.

⁸ *East Brandywine & W. R. Co. v. Ranck*, 78 Pa. St. 454; *Concord R. Co. v. Greely*, 23 N. H. 237, 242. See *Webber v. Eastern R. Co.*, 2 Met. 147. As to admission of the owner's sworn statements made to assessors for the purposes of taxation, see *Virginia & T. R. Co. v. Henry*, 8 Nev. 165.

⁹ *Wyman v. Lexington & W. C. R. Co.*,

damages to prove the rental value of the property leased.¹ Such witnesses are competent, not strictly as experts, having peculiar skill or scientific attainments, but as persons having particular knowledge of facts in issue.² They need not have been the owners, or even the buyers or sellers of land, or have heard of sales directly from buyers or sellers; but it is only necessary that they should be acquainted with the property taken, and have acquired in some way information sufficient to qualify them to give an opinion.³ The test has been met in some cases by slight evidence,⁴ but at least some special opportunities for forming a judgment should appear.⁵ Whether the witness is qualified to give an opinion is a question largely within the discretion of the judge or officer presiding at the trial.⁶

The following have been admitted to testify as to the value

13 Met. 316; *Walker v. Boston*, 8 Cush. 279; *Dwight v. County Com'rs*, 11 Cush. 201; *Shaw v. Charlestown*, 2 Gray, 107; *Russell v. Horn Pond Branch R. Co.*, 4 Gray, 607; *West Newbury v. Chase*, 5 Gray, 421; *Fowler v. Middlesex*, 6 Allen, 92; *Shattuck v. Stoneham Branch R.*, 6 Allen, 115; *Swan v. Middlesex*, 101 Mass. 173; *Sexton v. North Bridgewater*, 116 Mass. 200; *Tucker v. Mass. R. Co.*, 118 Mass. 546; *Snow v. Boston & M. R.*, 65 Me. 230; *Pearl Street Case*, 19 Wend. 651; *Troy & B. R. Co. v. Lee*, 13 Barb. 169; *Troy & B. R. Co. v. Northern Turnp. Co.*, 16 Barb. 100, 104; *Clark v. Baird*, 9 N. Y. 183; *Robertson v. Knapp*, 35 N. Y. 91; *Sater v. Burlington & Mt. P. Plank Road*, 1 Iowa, 386; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288, 311; *Dalzell v. Davenport*, 12 Iowa, 437; *Harrison v. Iowa Midland R. Co.*, 36 Iowa, 323; *East Penn. R. Co. v. Heister*, 40 Pa. St. 53; *Brown v. Corey*, 43 Pa. St. 495; *East Penn. R. Co. v. Hottentstine*, 47 Pa. St. 28; *Pittsburg & C. R. Co. v. Rose*, 74 Pa. St. 362; *Illinois & W. R. Co. v. Van Horn*, 18 Ill. 257; *Lafayette, B., & M. R. Co. v. Winslow*, 66 Ill. 219; *Evansville, I., & C. S. L. R. Co. v. Cochran*, 10 Ind. 560; *Frankfort & K. R. Co. v. Windsor*, 51 Ind. 238; *Simmons v. St. Paul & C. R. Co.*, 18 Minn. 184; *Colvill v. St. Paul & C. R. Co.*, 19 Minn. 283; *Lehmiecke v. St. Paul, S., & T. F. R. Co.*, 19 Minn. 464; *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500; *Curtis v. St. Paul, S., & T.*

F. R. Co., 20 Minn. 28; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 127; *Hosher v. Kansas City, St. J., & C. B. R. Co.*, 60 Mo. 303; *Tate v. M., K., & T. R. Co.*, 64 Mo. 149; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *Snyder v. Western Union R. Co.*, 25 Wis. 60; *Missouri River, Ft. S., & R. Co. v. Owen*, 8 Kan. 409; *Selma, R., & D. R. Co. v. Keith*, 53 Ga. 178.

¹ *Lawrence v. Boston*, 119 Mass. 126.

² *Shattuck v. Stoneham Branch R. Co.*, 6 Allen, 115; *Swan v. Middlesex*, 101 Mass. 173; *Pinkham v. Chelmsford*, 109 Mass. 225; *Snow v. Boston & M. R.*, 65 Me. 230; *Frankfort & K. R. Co. v. Windsor*, 51 Ind. 238; *Diedrich v. Northwestern U. R. Co.*, 47 Wis. 662.

³ *Whitman v. Boston & M. R.*, 7 Allen, 313. It is not required that the witness should himself have been upon the land. *Lehmiecke v. St. Paul, S., & T. F. R. Co.*, 19 Minn. 464.

⁴ *Whitman v. Boston & M. R.*, 7 Allen, 313; *Lehmiecke v. St. Paul, S., & T. F. R. Co.*, 19 Minn. 464.

⁵ *Flint v. Flint*, 6 Allen, 34; *Whitney v. Boston*, 98 Mass. 312; *Boston & M. R. v. Montgomery*, 119 Mass. 114; *Buffum v. New York & B. R. Co.*, 4 R. I. 221; *Central Pacific R. Co. v. Pearson*, 35 Cal. 247.

⁶ *Swan v. Middlesex*, 101 Mass. 173; *Tucker v. Mass. Cent. R. Co.*, 118 Mass. 546; *Boston & M. R. v. Montgomery*, 119 Mass. 114; *Lawrence v. Boston*, 119 Mass. 126; *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

of the land taken: municipal assessors accustomed to appraise property for the purpose of taxation,¹ although their official valuations are not admissible;² county commissioners or selectmen who have assessed damages for land taken for public use;³ persons living near, who have bought and sold, or have known by hearsay of sales;⁴ farmers resident in the neighborhood who are acquainted with the property, and have in some way become qualified to give an opinion as to its value;⁵ and other persons living in the neighborhood are, it has been held, presumed to have sufficient knowledge to testify as to the value, leaving the weight of their testimony to be determined by the jury.⁶

Opinions as to the Amount of Damage. — Opinions are admissible as to the amount of damage or benefit resulting to an estate from the construction and working of a railroad.⁷ The amount may also be calculated by comparing the valuations of the property before and after the taking, as made by the witnesses,⁸ — a method which is relieved of the objection that the amount of the damages is the issue to be found by the jury.⁹

¹ *Whitman v. Boston & M. R.*, 7 Allen, 313; *Swan v. Middlesex*, 101 Mass. 173; *Sexton v. North Bridgewater*, 116 Mass. 200; *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

² *Brown v. Providence, W., & B. R. Co.*, 5 Gray, 35; *Flint v. Flint*, 6 Allen, 34; *Kenerson v. Henry*, 101 Mass. 152; *Oregon Cascade R. Co. v. Bailly*, 3 Oreg. 164.

³ *Dickenson v. Fitchburg*, 13 Gray, 546; *Fowler v. County Com'rs*, 6 Allen, 92; *Webber v. Eastern R. Co.*, 2 Met. 147.

⁴ *Walker v. Boston*, 8 Cush. 279; *Russell v. Horn Pond Branch R. Co.*, 4 Gray, 607; *Fowler v. County Com'rs*, 6 Allen, 92; *Pinkham v. Chelmsford*, 109 Mass. 225; *East Penn. R. Co. v. Hottentstine*, 47 Pa. St. 28.

⁵ *Walker v. Boston*, 8 Cush. 279; *Russell v. Horn Pond Branch R. Co.*, 4 Gray, 607; *West Newbury v. Chase*, 5 Gray, 421; *Snyder v. Western Union R. Co.*, 25 Wis. 60; *Robertson v. Knapp*, 35 N. Y. 91.

⁶ *Penn. & N. Y. R. & C. Co. v. Bunnell*, 81 Pa. St. 414.

⁷ *Vandine v. Burpee*, 13 Met. 288;

Brainard v. Boston & N. Y. R. Co., 12 Gray, 407; *Shattuck v. Stoneham Branch R. Co.*, 6 Allen, 115; *Swan v. Middlesex*, 101 Mass. 173; *Jacksonville, A., & St. L. R. Co. v. Caldwell*, 21 Ill. 75; *Galena & S. W. R. Co. v. Haslam*, 73 Ill. 494; *Cairo & St. L. R. Co. v. Woosley*, 85 Ill. 370; *Snyder v. Western Union R. Co.*, 25 Wis. 60; *Diedrich v. Northwestern Union R. Co.*, 47 Wis. 662; *Snow v. Boston & M. R.*, 65 Me. 230.

⁸ *Snow v. Boston & M. R.*, 65 Me. 230; *Farrand v. Chicago & N. W. R. Co.*, 21 Wis. 435; *Diedrich v. Northwestern Union R. Co.*, 47 Wis. 662; *Curtis v. St. Paul, S., & T. F. R. Co.*, 20 Minn. 28; *Sherwood v. St. Paul & C. R. Co.*, 21 Minn. 127; *Shaw v. Charlestown*, 2 Gray, 107; *Dwight v. County Com'rs*, 11 Cush. 201; *Swan v. Middlesex*, 101 Mass. 173; *Carter v. Thurston*, 58 N. H. 104; *Houston & T. C. R. Co. v. Knapp*, 51 Tex. 592, 569. See *Watson v. Pittsburg & C. R. Co.*, 37 Pa. St. 469.

⁹ This is the ground on which the evidence has been excluded in some cases. *Atlantic & G. W. R. Co. v. Campbell*, 4 Ohio St. 583; *Cleveland & P. R. Co.*

Some authorities confine the witness to a statement of the particular injuries, leaving the jury to estimate the compensation due on account of them to the land-owners.¹

Opinions on Various Matters affecting the Damages. — Opinions as to the value of other lands similar to that in controversy,² or as to the effect of the construction of the railroad upon such other lands,³ are not admissible. Witnesses having special knowledge and experience in such matters may testify to the increased expense and inconvenience of carrying on a farm by reason of the railroad;⁴ to the benefit likely to result to land from the location of a station near it;⁵ the probable injury which a particular structure or erection would cause to the remaining land;⁶ the effect of operating a railroad on the rate of insurance,⁷ or on the rent⁸ of buildings situated near it; and the capacity of the land for valuable uses.⁹ But the inquiry must be of a nature which admits of a judgment, founded on experience, and not one which admits only of speculation and conjecture.¹⁰ Thus, opinions are inadmissible as to the value of a reversion in a railway location, where it is impossible to determine the duration of an existing easement.¹¹ Opinions as to matters indefinite and prospective in their nature, — such, for

v. Ball, 5 Ohio St. 568; *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 142.

¹ *Rochester & S. R. Co. v. Budlong*, 6 How. Pr. 467; *Troy & B. R. Co. v. Northern Turnp. Co.*, 16 Barb. 100; *Canandaigua & N. F. R. Co. v. Payne*, 16 Barb. 273; *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. 425; *Bloomfield & R. Nat. Gas Light Co. v. Calkins*, 1 Thomp. & C. 549; *Montgomery & W. P. R. Co. v. Varner*, 19 Ala. 185; *Alabama & F. R. Co. v. Burkett*, 42 Ala. 83; *Evansville, I., & C. S. R. Co. v. Fitzpatrick*, 10 Ind. 120; *Baltimore, P., & C. R. Co. v. Johnson*, 59 Ind. 247, 480; *Baltimore, P., & C. R. Co. v. Stoner*, 59 Ind. 579; *Elizabethtown & P. R. Co. v. Helm*, 8 Bush, 681; *Dalzell v. Davenport*, 12 Iowa, 437; *Prosser v. Wapello County*, 18 Iowa, 327; *Russell v. Burlington*, 30 Iowa, 262; *Harrison v. Iowa Midland R. Co.*, 36 Iowa, 323.

² *Wyman v. Lexington & W. C. R. Co.*, 13 Met. 316; *Shattuck v. Stoneham Branch R. Co.*, 6 Allen, 115.

³ *Selma & M. R. Co. v. Knapp*, 42 Ala.

480; *Concord R. Co. v. Greely*, 23 N. H. 237.

⁴ *Rockford, R. I., & St. L. R. Co. v. McKinley*, 64 Ill. 338; *Milwaukie & M. R. Co. v. Eble*, 4 Chandler (Wis.), 72; *Tucker v. Mass. Cent. R. Co.*, 118 Mass. 546; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515.

⁵ *Hayes v. Ottawa, O., & F. R. V. R. Co.*, 54 Ill. 373; *Shaw v. Charlestown*, 2 Gray, 107.

⁶ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

⁷ *Webber v. Eastern R. Co.*, 2 Met. 147.

⁸ *Selma & M. R. Co. v. Knapp*, 42 Ala. 480; *Pittsburg, V., & C. R. Co. v. Rose*, 74 Pa. St. 362.

⁹ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

¹⁰ *Elizabethtown & P. R. Co. v. Helm*, 8 Bush, 681; *Central Pacific R. Co. v. Pearson*, 35 Cal. 247; *Troy & B. R. Co. v. Northern Turnp. Co.*, 16 Barb. 100.

¹¹ *Boston & W. R. Co. v. Old Colony & F. R. Co.*, 3 Allen, 142.

instance, as the rental value of land which is vacant, if a suitable and proper building were erected upon it,¹ or as to the probable future use of the property,² — are to be excluded. An opinion on a question of legal duty is not admissible.³

Grounds for Opinions. — Witnesses testifying to the value or amount of injury may, when examined in chief, state the facts and reasons on which their opinions are founded.⁴ They have even been allowed to repeat, as such reasons, the statements made to them by third parties; but the jury ought to be instructed to disregard hearsay evidence introduced in this way. Such witnesses may be asked as to their having previously testified in similar hearings, in order to test their qualification.⁵

Proof of Mode of Construction. — In case of the assessment of damages before the construction of the railroad, proof of what is required in its legal and proper construction is admissible.⁶ The company's plans may be shown in evidence for this purpose.⁷ Where the assessment is made after the construction, the jury may consider the state of facts existing at the time of the trial.⁸

Damages Recoverable for an Unlawful Entry. Injuries of a Permanent Nature. — The special remedy applies only to a legal appropriation of private property, and the remedies at common law are

¹ *Burt v. Wigglesworth*, 117 Mass. 302; *Gardner v. Brookline*, 127 Mass. 308.

² *Fairbanks v. Fitchburg*, 110 Mass. 224; *Pinkham v. Chelmsford*, 109 Mass. 225.

³ *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 142.

⁴ *Dickenson v. Fitchburg*, 13 Gray, 546; *Dwight v. County Com'rs*, 11 Cush. 201; *Sexton v. North Bridgewater*, 116 Mass. 200; *Hawkins v. Fall River*, 119 Mass. 94; *Gardner v. Brookline*, 127 Mass. 358; *Brown v. Corey*, 43 Pa. St. 495; *Illinois & W. R. Co. v. Von Horn*, 18 Ill. 257; *Lafayette, B., & M. R. Co., v. Winslow*, 66 Ill. 219; *Snyder v. Western Union R. Co.*, 25 Wis. 60. The witness may be cross-examined as to the reasons of his opinion. *Missouri, K., & T. R. Co.*

v. Haines, 10 Kan. 439; *Atchison, T., & S. F. R. Co. v. Blackshire*, 10 Kan. 477.

⁵ *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544.

⁶ *Nason v. Woonsocket Union R. Co.*, 4 R. I. 377. See *Thompson v. Mil. & St. P. R. Co.*, 27 Wis. 93; *Price v. Milwaukee & St. P. R. Co.*, 27 Wis. 98.

⁷ *Jacksonville & S. R. Co. v. Kidder*, 21 Ill. 131; *St. Louis, J., & C. R. Co. v. Mitchell*, 47 Ill. 165; *Peoria & R. I. R. Co. v. Birkett*, 62 Ill. 332. The company is held in the Illinois cases to be liable to an action for injury caused by deviation from its plans.

⁸ *Hayes v. Ottawa, O., & F. R. V. R. Co.*, 54 Ill. 373; *Dearborn v. Boston, C., & M. R. Co.*, 24 N. H. 179. See *Watson v. Pittsburg & C. R. Co.*, 37 Pa. St. 469.

available where the appropriation is without authority of law.¹ If the company makes an unlawful entry to construct its road, it is liable in an action of trespass for the injury accruing prior to the commencement of the action. The satisfaction of the judgment does not, however, like the payment of the award in proceedings for condemnation, make the appropriation legal, but the company remains liable to successive actions of trespass for the continuing nuisance.² The damages must, therefore, be limited to the injury resulting prior to the suit, and cannot include compensation for the permanent depreciation of the property. Upon a bill in equity, praying for an injunction to restrain the company from continuing the nuisance, the damages are limited to the injuries suffered prior to the suit.³ But where the injury is necessarily of a permanent nature, such as the flooding of land caused by the company's structures, or the depreciation of the adjoining owner's property by the laying of its tracks on the highway, the damages, recoverable in an action of trespass, will include the entire injury, and the judgment will be a bar to actions for subsequent injury arising from the same cause.⁴

A court of equity may, upon a bill to enjoin a company which has unlawfully entered upon the permanent occupation of private property for the construction of a railroad, without paying compensation, allow, as incident to equitable relief, and as the alternative of a perpetual injunction, the payment of damages to the land-owner

¹ *Ante*, p. 179.

² *Mahon v. New York Cent. R. Co.*, 24 N. Y. 658; *Plate v. New York Cent. R. Co.*, 37 N. Y. 472; *Carl v. Sheboygan & F. R. Co.*, 46 Wis. 625; *Blesch v. Chicago & N. W. R. Co.*, 43 Wis. 183; *Cumberland & O. Canal v. Hitchings*, 65 Me. 140; *Hatfield v. Central R. Co.*, 4 Vroom, 251; *Bare v. Hoffman R. Co.*, 79 Pa. St. 71; *Anderson, L., & St. L. R. Co. v. Kernodle*, 54 Ind. 314; *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215; *Adams v. Hastings & D. R. Co.*, 18 Minn. 260; *Hartz v. St. Paul & S. C. R. Co.*, 21 Minn. 358; *Pinney v. Berry*, 61 Mo. 359; *Cleveland & M. R. Co. v. Robbins* (Ohio S. C., Jan. 1880), 10 Reporter, 276; *Cain v. Chicago, R. I., & P. R. Co.* (Iowa S. C.), 21 Albany L. J. 95; *Battishill v. Reed*, 18 C. B. 696. See *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241; *Stockton & L. G. R. Co. v. Stockton & C. R. Co.*, 53 Cal. 11.

³ *Bird v. W. & M. R. Co.*, 8 Rich. Eq. 46.

⁴ *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Fowle v. New Haven & N. Co.*, 107 Mass. 352, 112 Mass. 334; *Powers v. Council Bluffs*, 45 Iowa, 652; *Cooper v. Randall*, 59 Ill. 317; *Chicago & P. R. Co. v. Stein*, 75 Ill. 41; *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339; *Chicago, R. I., & P. R. Co. v. Carey*, 90 Ill. 514; *Chicago & A. R. Co. v. Maher*, 91 Ill. 312; *Chase v. New York Cent. R. Co.*, 24 Barb. 273; *Easterbrook v. Erie R. Co.*, 51 Barb. 94; *C. B. U. P. R. Co. v. Twine*, 23 Kan. 585; *Dickson v. Chicago, R. I., & P. R. Co.* (Mo. S. C., April, 1880), 10 Reporter, 247; *Lamb v. Walker*, L. R. 3 Q. B. Div. 389. Compare cases cited in the preceding note, several of which are in conflict with those cited in this note.

for his entire injury ; and the company, upon paying the amount, will have the right of permanent use in like manner as if due proceedings had been had, with the appraisement and payment of damages, as provided by the special remedy.¹

Henderson v. New York Cent. R. Co., 78 N. Y. 423, 17 Hun, 434.

CHAPTER VIII.

RAILROADS UPON HIGHWAYS.

THE rights of the owners of land lying upon highways and streets, as affected by the laying of railroads upon or across them, will be chiefly treated in this chapter; but various obligations of the owners and managers of such railroads to the public will be incidentally referred to. The uses to which highways may be put under the public right acquired by the original taking, and the conditions under which the adjoining owners are entitled to compensation when railroads worked by steam or horse power are laid upon them, will be especially considered.

In determining the rights of land-owners it is not material whether the land for the street was originally dedicated gratuitously by the owner, or appropriated by the State by compulsory proceedings.¹ A distinction has been suggested between highways in the open country, and streets within the limits of cities or populous villages, according to which the latter may be used for more various uses than the former, as for laying gas and water pipes, or for any other like purposes conducive to the comfort and health of the inhabitants.² But as both the highway and the street are appropriated for the same general purpose, and a highway in a district sparsely inhabited at one time may, by the growth of population, become a street in a city, this distinction does not appear to rest on a sound basis.³

It seems, on principle, immaterial in determining the proper uses of a highway whether the adjacent owner retains the fee in the street. If he retains it, the easement granted to the public should be deemed broad enough for all modes of travel consistent with the primary and general one; and even if the

¹ *Williams v. New York Cent. R. Co.*, 18 Barb. 222, 16 N. Y. 97; *Drake v. Hudson River R. Co.*, 7 Barb. 508.

² *Chapman v. Albany & S. R. Co.*, 10 Barb. 360; *Plant v. Long Island R. Co.*, 10 Barb. 26; *Milbau v. Sharp*, 15 Barb. 193; *Williams v. New York Cent. R. Co.*,

18 Barb. 222, 246, 16 N. Y. 97; *Wetmore v. Story*, 22 Barb. 414, 486, 3 Abbott Pr. 262; *People v. Kerr*, 27 N. Y. 188, 201, 215.

³ *People v. Law*, 34 Barb. 494; *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, 10 C. E. Green, 384.

public has acquired the fee, he has still an interest in the street for access and passage which is entitled to protection.¹

Changes of Use, when a new Taking.—The use of property taken by the right of eminent domain is not confined to the precise mode or kind of use which was in view at the time of the taking, but may extend to other modes which were then unpractised and unknown. When property has been taken for a public use, and full compensation made for the fee or a perpetual easement, its subsequent appropriation to another public use—certainly if one of a like kind—does not require further compensation to the owner.² Nor is such compensation required where there is a change in the person or body enjoying and controlling the property taken, or in the conditions upon which the public may use it. Accordingly, the adjoining owner is not deprived of any constitutional right when a highway is transferred to a private corporation charged with the duty of maintaining it and invested with the power of taking tolls,³ nor when a turnpike becomes free to public travel.⁴ There is no change of use involving a new taking when, under legislative authority, the location of a plank-road or canal is converted into that of a highway,⁵ or of a railroad.⁶

Highways may be used, under legislative authority, for other

¹ *Haynes v. Thomas*, 7 Ind. 38; *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467, 469; *Cincinnati & S. G. A. St. R. Co. v. Cumminsville*, 14 Ohio St. 523, 546; *Louisville & F. R. Co. v. Brown*, 17 B. Monr. 763, 775; *Cosby v. Owensboro & R. R. Co.*, 10 Bush, 288; *Elizabethtown, L., & B. S. R. Co. v. Combs*, 10 Bush, 382; *Jeffersonville, M., & I. R. Co. v. Esterle*, 13 Bush, 667; *Cadle v. Muscatine W. R. Co.*, 44 Iowa, 11; *Barney v. Keokuk*, 94 U. S. 324, 340; *Kellinger v. Forty-Second Street R. Co.*, 50 N. Y. 206. The vacation of a highway is not an actionable injury. *Barr v. Oskaloosa*, 45 Iowa, 275; *Gray v. Iowa Land Co.*, 26 Iowa, 387.

² *Chase v. Sutton Man. Co.*, 4 Cush. 152; *Pierce v. Somersworth*, 10 N. H. 369; *Heyward v. New York*, 7 N. Y. 314; *Rexford v. Knight*, 11 N. Y. 308.

³ *Chagrin Falls & C. Plank R. Co. v. Cane*, 2 Ohio St. 419; *Cincinnati & S. G. A. St. R. Co. v. Cumminsville*, 14 Ohio

St. 523, 545, 548; *Benedict v. Goit*, 3 Barb. 459; *Davis v. New York*, 14 N. Y. 506, 516; *Walker v. Caywood*, 31 N. Y. 51; *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404, 412; *Wright v. Carter*, 3 Dutcher, 76; *Douglass v. Boonsborough Turnp. Road Co.*, 22 Md. 219. But see *Williams v. Natural Bridge Plank R. Co.*, 21 Mo. 580; *Cape Girardeau & B. M. & G. Road Co. v. Renfroe*, 56 Mo. 265.

⁴ *Murray v. County Com'rs*, 12 Met. 455. See *Stetson v. Bangor*, 60 Me. 313.

⁵ *Malone v. Toledo*, 28 Ohio St. 643, 34 Ohio St. 541.

⁶ *Brainard v. Missisquoi R. Co.*, 48 Vt. 107; *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 92, in which compensation was allowed for the special damage caused by the change; *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio St. 169. See *Lafayette, M., & B. R. Co. v. Murdock*, 68 Ind. 137. As to the use of the location for a line of telegraph, see *ante*, p. 159.

purposes than mere travel, as for drains, sewers, water and gas pipes, and tunnels, which promote the general health or convenience, without further compensation to the adjoining owner;¹ but not, it has been held, for a market.² The right of laying gas-pipes in the highway is, however, a franchise which can be derived only from the State.³

A Railroad in a Highway not necessarily a Different Use.—The purpose of opening a highway or street is, to provide the public with a right of passage for persons on foot or riding in carriages or other kinds of vehicles. The use for which this public right is obtained is not confined to the same species of vehicles, drawn by the same kind of power that prevailed at the time of the dedication or appropriation, but admits of the passage and repassage of such other vehicles, operated in such a mode and by such forces as an advanced civilization may require for the general convenience. The improved method of conveyance may incidentally increase or depreciate the value of property on the highway; but, provided the right of ingress and egress, of passage and repassage, is left reasonably free to the adjoining owner, the injury is one which the law does not recognize. A railroad laid out over or upon a highway or street, under proper legal authority, is within the legal intent of the original sequestration or dedication, and is not an invasion of private right entitling the owner to compensation by virtue of the constitutional prohibition, provided it is so laid and constructed as not to be incompatible with the use of the highway in the other usual modes of passage and conveyance. It is not necessarily a nuisance, even in a large city, although it may to a certain extent interrupt the free passage of other kinds of vehicles; and unless unreasonable or permanently exclusive in its occupation of the highway, when authorized by competent authority, it is not an invasion of private rights. The statute which authorizes the structure to be laid legalizes the obstruction, and is a defence to an action or an indictment. The exclusive right to take tolls from persons who are carried in its cars, vested in a private corporation

¹ *West v. Bancroft*, 32 Vt. 387; *Plant v. Long Island R. Co.*, 10 Barb. 26; *Kelsey v. King*, 32 Barb. 410; *Malone v. Toledo*, 28 Ohio St. 643, 34 Ohio St. 541; *Chicago v. Rumsey*, 87 Ill. 348. Streets

may be used for a boulevard. *People v. Walsh*, 13 Chicago Leg. News, 23.

² *State v. Laverack*, 5 Vroom, 201

³ *Jersey City Gas Co. v. Dwight*, 2 Stewart (N. J.), 242.

or individuals, does not make such a use of the highway a diversion from its original purpose any more than if a like structure were laid by the city or town.¹

A Railroad in a Highway held in Several States to be a Different and Additional Use. — The law, however, as to the rights incident to the ownership of land upon highways is, in certain jurisdictions, held otherwise than as here stated. A railroad, with tracks laid under statute authority on the highway by individuals or a private corporation, with the right to take tolls for carrying persons and goods, even when a reasonable passage for ordinary vehicles is preserved, has sometimes been treated as an appropriation of the highway to a new and distinct use entirely foreign to the original one, and subjecting it to an additional servitude and easement, which, even without any special damage, is a taking of private property requiring compensation to the adjoining owner, who by legal presumption is deemed to be the owner of the fee of the highway. The Court of Appeals of New York, reviewing the earlier and conflicting decisions,² adopted in 1857 this view,

¹ *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289; *Wolfe v. Covington & L. R. Co.*, 15 B. Monr. 404; *Louisville & F. R. Co. v. Brown*, 17 B. Monr. 763; *Cosby v. Owensboro & R. R. Co.*, 10 Bush, 288; *Elizabethtown, L., & B. S. R. Co. v. Combs*, 10 Bush, 382; *Phil. & T. R. Co., In re*, 6 Whart. 25; *Monongahela Nav. Co. v. Coons*, 6 W. & S. 101; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339; *Snyder v. Penn. R. Co.*, 55 Pa. St. 340; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325; *Danville, H., & W. R. Co. v. Commonwealth*, 73 Pa. St. 29; *Phillips v. Dunkirk, W., & P. R. Co.*, 78 Pa. St. 177; *Struthers v. Dunkirk, W., & P. R. Co.*, 87 Pa. St. 282; *Brown v. Duplessis*, 14 La. An. 842; *Moses v. Pittsburg, Ft. W., & C. R. Co.*, 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279; *Stone v. Fairbury, P., & N. W. R. Co.*, 68 Ill. 394; *Chicago, R. I., & P. R. Co. v. Joliet*, 79 Ill. 25; *Chicago, B., & Q. R. Co. v. McGinnis*, 79 Ill. 269; *Porter v. North Mo. R. Co.*, 33 Mo. 128; *Lackland v. North Mo. R. Co.*, 34 Mo. 259; *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228, 3 Mo. Ap. 315; *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Clin-ton v. Cedar Rapids & M. R. R. Co.*, 24

Iowa, 455; *Ingraham v. Chicago, D., & M. R. Co.*, 38 Iowa, 669, 34 Iowa, 249; *Chicago, N., & S. W. R. Co. v. Newton*, 36 Iowa, 299; *Cadle v. Muscatine W. R. Co.*, 44 Iowa, 11; *Barr v. Oskaloosa*, 45 Iowa, 275; *Davis v. C. & N. W. R. Co.*, 46 Iowa, 389; *Barney v. Keokuk*, 94 U. S. 324; *Whittier v. Portland & K. R. Co.*, 38 Me. 26; *Attorney-General v. Metropolitan R.*, 125 Mass. 515; *Mc-Lauchlin v. Charlotte & S. C. R. Co.*, 5 Rich. 583; *Hatch v. Vt. Cent. R. Co.*, 25 Vt. 49; *Richardson v. Vt. Cent. R. Co.*, 25 Vt. 465; *Brainard v. Missisquoi R. Co.*, 48 Vt. 107; *Cincinnati & S. G. A. St. R. Co. v. Cummins*, 14 Ohio St. 523; *Sargent v. Ohio & M. R. Co.*, 1 Handy (Cincinnati), 52; *Tate v. Ohio & M. R. Co.*, 7 Ind. 479; *New Albany & S. R. Co. v. O'Daily*, 12 Ind. 551; *Wabash & E. Canal v. Spears*, 16 Ind. 441; *Market St. R. Co. v. Central R. Co.*, 51 Cal. 583. See *Pekin v. Brereton*, 67 Ill. 477; *Towle v. Eastern R. Co.*, 17 N. H. 519, 18 N. H. 547.

² The following cases were thought to sustain the conclusion to which the Court of Appeals came in holding the railroad to be a new use: *Fletcher v. Auburn & S.*

and has continued to apply it to steam railroads;¹ and its authority has had a sensible effect on the course of judicial opinion in this country.² The same court has with logical consistency applied the doctrine to street railways worked by animal power,³ while in other States a distinction has been taken between the two kinds of railroads.⁴ The doctrine which treats a railroad,

R. Co., 25 Wend. 462; *Mahan v. Utica & S. R. Co.*, *Lalor's Sup. to Hill & Denio*, 156; *Presbyterian Society of Waterloo v. Auburn & S. R. Co.*, 3 Hill, 567; *Miller v. Auburn & S. R. Co.*, 6 Hill, 61; *Benedict v. Goit*, 3 Barb. 459. But the current of authorities in that State was at that time otherwise. *Drake v. Hudson River R. Co.*, 7 Barb. 508; *Plant v. Long Island R. Co.*, 10 Barb. 26; *Chapman v. Albany & S. R. Co.*, 10 Barb. 360; *Adams v. Saratoga & W. R. Co.*, 11 Barb. 514; *Hentz v. Long Island R. Co.*, 13 Barb. 646; *Milhau v. Sharp*, 15 Barb. 193; *Wetmore v. Story*, 22 Barb. 414, 3 Abbott Pr. 262; *Corey v. Buffalo, C., & N. Y. R. Co.*, 23 Barb. 482; *Anderson v. Rochester, L., & N. F. R. Co.*, 9 How. Pr. 553; *Hamilton v. New York & H. R. Co.*, 9 Paige, 171. The case of *Fletcher v. Auburn & S. R. Co.*, 25 Wend. 462, has been the subject of much comment. See *Chapman v. Albany & S. R. Co.*, 10 Barb. 360, 366; *Corey v. Buffalo, C., & N. Y. R. Co.*, 23 Barb. 482; *Radcliff v. Brooklyn*, 4 N. Y. 195, 205; *Davis v. New York*, 14 N. Y. 506, 521; *Kellinger v. Forty-Second St. R. Co.*, 50 N. Y. 206, 211.

¹ *Williams v. New York Cent. R. Co.*, 16 N. Y. 97, 18 Barb. 222; *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423, 17 Hun, 344; *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655; *Mahon v. New York Cent. R. Co.*, 24 N. Y. 658; *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404, 39 Barb. 494; *Washington Cemetery v. Prospect Park & C. I. R. Co.*, 68 N. Y. 591, 7 Hun, 655; *Murdock v. Prospect Park & C. I. R. Co.*, 73 N. Y. 579, 10 Hun, 598; *New York Cent. & H. R. R. Co., In re*, 15 Hun, 63; *Prospect Park & C. I. R. Co., In re*, 13 Hun, 345, 16 Hun, 261. The case of *Williams v. New York Cent. R. Co.*, commenced in 1853, still lingers in the courts of New York, and twenty-six years after the suit was brought (the plaintiff having died) re-

appeared, in 1879, in the Court of Appeals under the name of *Henderson*, his representative, as plaintiff, 78 N. Y. 423. See *Brooklyn Cent. & J. R. Co. v. Brooklyn City R. Co.*, 33 Barb. 420, and *People v. Law*, 34 Barb. 494, for comments restricting the authority of *Williams v. New York Cent. R. Co.* to its precise facts.

² *Gray v. St. Paul & P. R. Co.*, 13 Minn. 315; *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215; *Adams v. Hastings & D. R. Co.*, 18 Minn. 260; *Brisbine v. St. Paul & S. C. R. Co.*, 23 Minn. 114; *Schurmeier v. St. Paul & P. R. Co.*, 10 Minn. 82, 7 Wall. 272; *Starr v. Camden & A. R. Co.*, 4 Zab. 592; *State v. Laverack*, 5 Vroom, 201; *Hinchman v. Paterson Horse R. Co.*, 2 C. E. Green, 75; *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 5 C. E. Green, 61; *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, 10 C. E. Green, 384; *Nicholson v. New York & E. R. Co.*, 22 Conn. 74; *Imlay v. Union Branch R. Co.*, 26 Conn. 249; *Jones v. Keith*, 37 Tex. 394; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Cox v. Louisville, N. A., & C. R. Co.*, 48 Ind. 178; *Lafayette, M., & B. R. Co. v. Murdock*, 68 Ind. 137; *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609; *Pomeroy v. Mil. & C. R. Co.*, 16 Wis. 640; *Sherman v. Mil., L. S., & W. R. Co.*, 40 Wis. 645; *Blesch v. Chicago & N. W. R. Co.*, 43 Wis. 183; *Cape Girardeau & B. M. & G. Road v. Renfro*, 58 Mo. 265.

³ *Craig v. Rochester City & B. R. Co.*, 39 N. Y. 404, 39 Barb. 494.

⁴ *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 574; *Hogenscamp v. Paterson Horse R. Co.*, 2 C. E. Green, 83; *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 5 C. E. Green, 61; *State v. Laverack*, 5 Vroom, 201; *Peddicord v. Balt., C., & E. M. Pass. R. Co.*, 34 Md. 463; *Attorney-General v. Metropolitan R.*, 125 Mass. 515; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Stanley v. Davenport*, 6 Northwest. Rep. 706.

when laid on a highway, as a new easement, has been applied where it is laid on a turnpike,¹ and where a second railroad has been laid on a highway after the owner has received compensation for the laying of the first.²

The points of the argument leading to this result are as follows:—

1. The grant of a right to lay and use the rails and occupy a part of the highway to certain individuals or a private corporation is a discrimination against the equal rights of all in the common highway. 2. The company's occupation of the rails and space included within them is exclusive while its vehicles are passing, and is an interference with such equal rights. 3. The railroad is most likely to injure the land-owner, whereas a highway is quite likely to benefit him. 4. In the assessment of compensation when land is taken for a highway, incidental damages to the remaining land are allowed, and benefits are deducted, and even contributions exacted with reference to the particular use for a highway, — a basis of calculation which may prove entirely unjust to the land-owner when permission is given to lay and use rails on the highway. 5. The use for a railroad may survive the use for a highway, and defeat the owner's reversionary right. These considerations apply to railroads worked by animal power as well as to those worked by steam, any difference between the two kinds being in degree and not in kind.

With reference to these points in order, it may be remarked briefly, —

1. Whether there is a new taking requiring compensation under the Constitution depends upon the nature of the use itself, and not upon the persons who are to manage or control it. The owner's right or injury is the same whether the State or any of its subdivisions, or any citizen by delegation of power, is to lay and use the rails. Further, the State may, under its police power, regulate the use of highways, and, acting in its discretion for the common good, allow on conditions certain privileges and powers to certain persons and bodies not allowed to all, without such permission being a taking of property.³ 2. Such occupation is, indeed, necessarily exclusive while the railway carriages are passing, as

¹ *Mahon v. New York Cent. R. Co.*, 24 N. Y. 658.

² *Southern Pacific R. Co. v. Reed*, 41 Cal. 256.

³ *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 579, 581-584; *Moses v. Pittsburg, Ft. W., & C. R. Co.*, 21 Ill. 516, 522.

two bodies cannot under a physical law occupy the same space at a time; such temporary exclusive occupation, however, is not peculiar to railway carriages, but attaches to all carriages while passing or stopping. At other times the space covered by the rails, and even the rails themselves, are open to general use. The State may indeed give a better right within such allotted space to the proprietors of the railway carriages; but this is merely the exercise of a police power which would justify the allotment of certain limits at certain times to omnibuses or other peculiar vehicles within the highway, accompanied with superior rights at such times within those limits.¹ It may be noted that this as well as the preceding point relates to the common rights of all citizens, and not to the peculiar rights of an adjoining land-owner, and is therefore not pertinent to an inquiry concerning his individual rights.

3. The accidental circumstance of a possible injury or probable benefit is not a final test upon the question whether or not a certain new mode of using a highway is in itself a taking of private property. 4. Waiving the inquiry under what conditions the Constitution secures a right to compensation for damages to land not actually appropriated, it is quite true that an owner whose compensation has been adjusted with reference to the advantages of a highway, but without reference to its subsequent partial use for a railway, may suffer practical injustice if not allowed further compensation for such subsequent use. But, on the other hand, when property is taken for public use, the compensation ought to be so adjusted as to be final, neither entitling him to more, nor requiring him to refund by reason of later authorized modes of using the property taken. The circumstance that improved or different modes of enjoying the public use have affected injuriously or beneficially his remaining estate is but one of the incidents to which all property is subject in civilized life, not only from the use of highways, but from the use of adjacent land and the various changes in the community. 5. The reversionary right, to take effect after a present ownership which may last forever, is too remote and contingent to be of appreciable value, or to be regarded as property requiring compensation on an appropriation to another use.²

¹ *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 5 C. E. Green, 61, 69, 70; *Attorney-General v. Metropolitan R.*, 125 Mass. 515.

² *People v. Kerr*, 27 N. Y. 188, 211; *Barney v. Keokuk*, 94 U. S. 324, 340. See *Heard v. Brooklyn*, 60 N. Y. 242.

The Court of Appeals has shown a distrust of its doctrine by excluding from it streets and highways in which the fee is deemed to have been acquired by the public, although held in trust for the people, to be used for streets only, and even if subject to the owner's reversionary right. Upon such highways it holds that the legislature may authorize a railway to be laid and worked without compensation to the adjoining owners.¹

The owners of land on a public highway, by legal presumption, hold the fee to its centre, subject to the public easement.² The State may authorize the taking of the fee for a public use, and the question, whether the fee or only an easement has been taken, is one of legislative intent. Whether the owner or the public holds the fee has been sometimes deemed a decisive point in determining whether the laying of a railroad in a street is a taking of the property of the adjoining owner;³ but, as already suggested, the constitutional question ought to be decided on less technical and more substantial grounds.

¹ *People v. Kerr*, 27 N. Y. 188, 37 Barb. 357, 38 Barb. 369; *Kellinger v. Forty-Second St. R. Co.*, 50 N. Y. 206; *Sixth Avenue R. Co. v. Gilbert Elevated R. Co.*, 43 N. Y. Superior, 292, 41 N. Y. Superior, 489. See *Brooklyn Cent. & J. R. Co. v. Brooklyn City R. Co.*, 33 Barb. 420; *People v. Law*, 34 Barb. 494, 503; *Wetmore v. Law*, 34 Barb. 515; *Brooklyn City & N. R. Co. v. Coney I. & B. R. Co.*, 35 Barb. 364. Contemporaneously with the decision of the Court of Appeals (1857), a similar result was reached in Connecticut, where the Supreme Court of Errors laid stress on the view that property taken under highway acts could, by the true intent of the original act of condemnation, be used only for a highway as generally existing at the time of the appropriation, and that, there being no legal identity between a common highway and a railroad, the highway cannot be used for a railroad, although an ample roadway is left for vehicles and passengers on foot. The court seemed to go so far as to hold that on this technical ground of want of legal identity a railroad could not be laid on a highway without proceedings for a new taking, even though it causes no injury or inconvenience to the land-owner. *Imlay v. Union Branch R. Co.*, 26 Conn.

249. But see *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 579.

² 3 Kent Com. 432, 433; *Hinchman v. Paterson Horse R. Co.*, 2 C. E. Green, 75, 82; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 72.

³ For cases where the public, being held to be the owner of the fee of the highway, the land-owner has been held not entitled to compensation, see *People v. Kerr*, 27 N. Y. 188, 37 Barb. 357, 38 Barb. 369; *Kellinger v. Forty-Second St. R. Co.*, 50 N. Y. 306; *Sweet v. Buffalo*, N. Y., & P. R. Co., 13 Hun, 643; *Carson v. Central R. Co.*, 35 Cal. 325; *Moses v. Pittsburgh, Ft. W., & C. R. Co.*, 21 Ill. 516; *Indianapolis, B., & W. R. Co. v. Hartley*, 67 Ill. 439; *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74; *Patterson v. Chicago, D., & V. R. Co.*, 75 Ill. 588; *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Colorado Cent. R. Co. v. Mollandin*, 4 Col. 154; *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Clinton v. Cedar Rapids & M. R. Co.*, 24 Iowa, 455; *Davis v. C. & N. W. R. Co.*, 46 Iowa, 389. See review of the authorities in *Kucheman v. C. C. & D. R. Co.*, 46 Iowa, 366. See *Stange v. Hill*, 7 Northwest. Rep. 115; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; and for other cases where there was held to be a

Some jurists have regarded property taken for public use as subject, without further compensation, to any public use to which the legislature may see fit to apply it, irrespective of the particular purpose which was in view at the time of the original taking.¹ This doctrine may in some cases work a hardship, and it is fraught with some danger to private rights; but it relieves the right of eminent domain of vexatious refinements and speculations. It derives support from the consideration that, in practice, whether an easement or the fee is taken, the full value of the land taken is given as compensation.² But whether so broad a doctrine is adopted or not, the use should not be limited by constitutional construction to the particular modes applied at the time of the taking, to the exclusion of those subsequently invented and practised, at least where the new mode still admits the reasonable enjoyment of the original use.³

The denial of the owner's constitutional right to compensation does not involve a denial of the duty of the legislature in many instances to give a remedy by statute, the constitutional right not being commensurate with natural justice.⁴ If the owner suffers substantial and peculiar injury from a new mode of using the highway, the legislature should require further compensation, irrespective of the kind of estate taken, or of distinctions between different modes of public conveyance which are likely to improve and vary from time to time.

Statutes which in general terms allow parties compensation for property injured are construed as allowing it, in case of structures on highways, only for injuries which are immediate and direct.⁵

private ownership of the fee requiring compensation, see *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Ford v. Chicago & N. W. R. Co.*, 14 Wis. 609; *Hegar v. Chicago & N. W. R. Co.*, 26 Wis. 624; *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215; *Kaiser v. St. Paul, S., & T. F. R. Co.*, 22 Minn. 149; *Cox v. Louisville, N. A., & C. R. Co.*, 48 Ind. 178; *Indianapolis, B., & W. R. Co. v. Smith*, 52 Ind. 428; *Indianapolis, B., & W. R. Co. v. Hartley*, 67 Ill. 439; *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74.

¹ *Phil. & T. R. Co., In re*, 6 Whart. 25, 45; *People v. Kerr*, 27 N. Y. 188, 192; *Ma-*

lone v. Toledo, 28 Ohio St. 643, 34 Ohio St. 541; *Cooley's Const. Lim.* [*555].

² *Murray v. County Com'rs*, 12 Met. 457; *Bemis v. Springfield*, 122 Mass. 110, 118; *Washington Cemetery v. Prospect Park & C. I. R. Co.*, 68 N. Y. 591.

³ *Barney v. Keokuk*, 94 U. S. 324; *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515.

⁴ *Miffin v. Harrisburg, P. M., & S. R. Co.*, 16 Pa. St. 182. See *Phillips v. Dunkirk, W., & P. R. Co.*, 78 Pa. St. 177.

⁵ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385. For English cases see *Beckett v. Midland R. Co.*, L. R. 3 C. P. 82; *Rickett v. Metropolitan R. Co.*, L. R. 2 H. L. 175.

Deprivation of the Land-owner's Access to and Use of the Highway or Street is a taking of his Property. — While the laying of a railroad on a highway without any peculiar or direct injury to the land-owner is not a taking of his property, changes in its surface and erections which destroy or materially obstruct his access to and use of it, and cause him special damage, may be treated as such taking; and this is the substantial result of many well-considered authorities.¹ Exposure to noise and smoke, detention and danger in crossing, the frightening of horses, and similar inconveniences and discomforts, not amounting to a practical obstruction, are, however, not a taking of private property;² nor are such injuries, when not caused by negligence, actionable.³

The taking of the entire location of a plank-road for a railroad entitles the owner of land lying on the plank-road to compensation for the expense of building a private road to the public highway, which is an injury peculiar to him; but not to compensation for being deprived of the use of the plank-road, this

¹ *Cincinnati S. G. A. St. R. Co. v. Cummins*, 14 Ohio St. 523; *Cincinnati College v. Nesmith*, 2 Cincinnati (Superior Ct.), 24; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, 294; *Cosby v. Owensboro & R. R. Co.*, 10 Bush, 288; *Elizabethtown, L., & B. S. R. Co. v. Combs*, 10 Bush, 382; *St. Paul & P. R. Co. v. Schurmeir*, 7 Wall. 272, 10 Minn. 82; *Drake v. Hudson River R. Co.*, 7 Barb. 508; *Corey v. Buffalo, C., & N. Y. R. Co.*, 23 Barb. 482; *People v. Kerr*, 27 N. Y. 188, 215; *Kellinger v. Forty-Second St. R. Co.*, 50 N. Y. 206; *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio & M. R. Co.*, 7 Ind. 479; *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Slatten v. Des Moines Valley R. Co.*, 29 Iowa, 148; *Stone v. Fairbury, P., & N. R. Co.*, 68 Ill. 394; *Indianapolis, B., & W. R. Co. v. Hawley*, 67 Ill. 439; *Pekin v. Mukel*, 77 Ill. 56; *Chicago, B., & Q. R. Co. v. McGinnis*, 79 Ill. 269; *Hobart v. Mil. City R. Co.*, 27 Wis. 194; *Chapman v. Oshkosh & M. R. R. Co.*, 33 Wis. 629; *Carl v. Sheboygan & F. R. Co.*, 46 Wis. 625; *C. B. U. & P. R. Co. v. Twine*, 28 Kan. 585; *Savannah, A., & G. R. Co. v. Shiels*, 33 Ga. 601, 616; *Lackland v. North Mo. R.*

Co., 31 Mo. 180; *Porter v. North Mo. R. Co.*, 33 Mo. 128; *Tate v. McK. & T. R. Co.*, 64 Mo. 149; *Atlantic & P. R. Co. v. St. Louis*, 3 Mo. App. 315; *Virginia & T. R. Co. v. Lynch*, 13 Nev. 92; *Fritz v. Hobson*, L. R. 14 Ch. Div. 542 (with notes, 19 Am. Law Reg. n. s. 615, 624-637).

² *Parrott v. Cincinnati, H., & D. R. Co.*, 10 Ohio St. 624; *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Higbee v. Camden & A. R. Co.*, 4 C. E. Green, 276; *Hobart v. Mil. City R. Co.*, 27 Wis. 194; *Stone v. Fairbury, P., & N. R. Co.*, 68 Ill. 394. See *Mix v. Lafayette, B., & M. R. Co.*, 67 Ill. 319; *Pekin v. Brereton*, 67 Ill. 477; *ante*, Chap. VII. p. 198. The taking away of the natural support of buildings by means of excavations in the highway has been held to be a taking of private property. *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117.

³ *Hahn v. Southern Pacific R. Co.*, 51 Cal. 605; *ante*, Chap. VII. p. 197; *post*, Chap. X. p. 264. The English cases in which an interference by a railway company with the highway are held to "injuriously affect" the land-owner are reviewed in *Beckett v. Midland R. Co.*, L. R. 3 C. P. 82.

being an injury which he suffers in common with other citizens.¹ But the owner of the fee of a canal has been held entitled to damages where a railroad was laid upon its location.²

Measure of Damages for Injuries to Land-owners caused by the Use of the Highway for a Railroad. — Where compensation is allowed to a land-owner for an authorized use of the highway by a railroad company, he is entitled to damages for the deterioration of his property, and the interruption of his business during the construction.³ But damages are recoverable only for injuries which are direct and immediate, to the exclusion of those which are suffered by the whole community.⁴ The damages are assessed in the special proceeding on the basis of a compliance with the law, not including damages for breach of duty or negligence.⁵ Where the road has been constructed in an improper manner upon a street, the land-owner has been held entitled to recover in an action the difference between the value of his property with the road as constructed, and its estimated value with the road properly constructed.⁶

Obstruction of Highways lawful only when, and to the Extent, authorized by Statute. — The right to obstruct highways, to place rails and other erections upon them, or to use them for other purposes than travel, exists only under statutes, which confer the authority expressly or by clear implication; ⁷ and the right cannot, without a practical necessity, be implied, to the extent of a serious interference with the public right of passage, from a gen-

¹ *Brainard v. Missisquoi R. Co.*, 48 Vt. 107.

² *Lafayette, M., & B. R. Co. v. Murdock*, 68 Ind. 137. But see *ante*, p. 233.

³ *St. Louis, V., & T. H. R. Co. v. Capps*, 67 Ill. 607, 72 Ill. 188; *Chicago, B., & Q. R. Co. v. McGinnis*, 79 Ill. 269; *St. Louis, V., & T. H. R. Co. v. Haller*, 82 Ill. 208; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Jeffersonville, M., & I. R. Co. v. Esterle*, 13 Bush. 667; *Hegar v. Chicago & N. R. Co.*, 26 Wis. 624; *Gear v. C. C. & D. R. Co.*, 39 Iowa, 23, 43 Iowa, 83; *Kucheman v. C. C. & D. R. Co.*, 46 Iowa, 366.

⁴ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Boston & W. R. Co. v. Old Colony R. Co.*, 12 Cush. 605; *Parrott v. Cincinnati, H., & D.*

R. Co., 10 Ohio St. 624; *Atchison & N. R. Co. v. Garside*, 10 Kan. 552, 567; *Stone v. Fairbury, P., & N. W. R. Co.*, 68 Ill. 394. See *Nicholson v. New York & N. H. R. Co.*, 22 Conn. 74.

⁵ *Gear v. C. C. & D. R. Co.*, 43 Iowa, 83, 39 Iowa, 23; *ante*, Chap. VII. p. 179.

⁶ *Cadle v. Muscatine W. R. Co.*, 44 Iowa, 11.

⁷ *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339; *Phillips v. Dunkirk, W., & P. R. Co.*, 78 Pa. St. 177; *Attorney-General v. Lombard & S. Streets Pass. R. Co.*, 10 Phil. 352, 32 Leg. Int. 238; *State v. Hoboken*, 6 Vroom, 205; *State v. Vt. Cent. R. Co.*, 27 Vt. 103; *Virginia & T. R. Co. v. Lynch*, 13 Nev. 339; *Atlantic & P. R. Co. v. St. Louis*, 3 Mo. App. 315, 66 Mo. 228. See *ante*, Chap. VII. p. 155.

eral grant to construct a railroad between certain termini.¹ The right, however, to occupy the highway to the extent of a reasonable necessity is often implied.² The right to cross or pass along a highway does not include the right to build permanent structures upon it, or to use it for a freight yard, or any exclusive purpose, but is limited to a reasonable use by crossing, passing, and repassing, consistent with the earlier public right.³ The power to establish a railroad in a public street includes the power to make a turnout, so as to communicate with a station on the street.⁴ The company may use the highway for making up trains and shifting cars; but such use of the highway can be made only to a reasonable extent, and in a manner consistent with other lawful modes of using it.⁵ It may stop its cars temporarily in the highway, in which its tracks are laid, for lading and unlading freight, where this can be done without serious interference with the ordinary uses of the highway.⁶

Liability for Nuisances on the Highway. — The company is liable as for a nuisance for using steam power on a highway without legal authority;⁷ crossing it in a manner not allowed by statute, or without complying with the conditions precedent;⁸ neglecting to keep bridges in repair;⁹ or to provide a draw in a bridge, when so required by law;¹⁰ delaying unreasonably either to remove obstructions which it was authorized to create temporarily,

¹ Long Branch Com'rs v. West End R. Co., 2 Stewart (N. J.), 566; Little Miami R. Co. v. Greene County, 31 Ohio St. 338; Louisville & N. R. Co. v. State, 3 Head, 523; Eyler v. County Com'rs, 49 Md. 257. The right to build a railroad over highways authorizes a crossing at a level, or running lengthwise on them. Gear v. C. C. & D. R. Co., 43 Iowa, 83.

² Long Branch Com'rs v. West End R. Co., 2 Stewart (N. J.), 566.

³ Allegheny v. Ohio & P. R. Co., 26 Pa. St. 355; Commonwealth v. Erie & N. E. R. Co., 27 Pa. St. 339; Gahagan v. Boston & L. R. Co., 1 Allen, 187; State v. Vt. Cent. R. Co., 27 Vt. 103; Lackland v. North Mo. R. Co., 31 Mo. 180; Chapman v. Oshkosh & M. R. R. Co., 33 Wis. 629, 638; State v. Morris & E. R. Co., 1 Dutcher, 437, 3 Zab. 360; Higbee v. Camden & A. R. Co., 4 C. E. Green, 276; Tennessee & A. R. Co. v. Adams, 3 Head, 596. See Hall v. Brown, 54 N. H. 495, 58 N. H. 93.

⁴ New Orleans & C. R. Co. v. New Orleans, 1 La. An. 128; Knight v. Carrollton, 9 La. An. 284.

⁵ Gahagan v. Boston & L. R. Co., 1 Allen, 187; State v. Vt. Cent. R. Co., 27 Vt. 103; State v. Morris & E. R. Co., 3 Zab. 360, 1 Dutcher, 437. See Clark v. Fry, 8 Ohio St. 358, 373.

⁶ Mathews v. Kelsey, 58 Me. 56. But see State v. Morris & E. R. Co., 1 Dutcher, 437, 3 Zab. 360.

⁷ State v. Tupper, Dudley (S. C.), 135; Jones v. Festiniog R. Co., L. R. 3 Q. B. 733.

⁸ Wellcome v. Leeds, 51 Me. 313; Commonwealth v. Nashua & L. R. Co., 2 Gray, 54.

⁹ Penn. & O. R. Co. v. Graham, 63 Pa. St. 290.

¹⁰ Commonwealth v. New Bedford Bridge, 2 Gray, 339; Commonwealth v. Nashua & L. R. Co., 2 Gray, 54.

or to substitute a new highway for an existing one, which it has occupied with its works.¹ Neither the use of steam power on the highway, nor the placing of gates at crossings for public safety, is a nuisance when authorized by statute.²

The right to maintain a nuisance in the highway cannot be acquired by prescription;³ but a city or town may be estopped by acts and acquiescence from setting up that the use of public grounds for a railroad is unauthorized.⁴

Mode of Crossing.—The right to a location across a highway carries with it the right to lay as many tracks as are essential to the convenient transaction of the company's business; and, while leaving it safe and convenient for travellers, to alter the surface to the extent necessary for properly laying and using them.⁵ The right to cross the highway does not authorize an appropriation of any part of it, or a material interference with public travel.⁶

The election of the company to cross under or over a highway, when the power of choice is conferred by statute, is not, when made in good faith, subject to judicial control;⁷ nor is the decision of a board or tribunal, which is authorized by statute to determine the mode of altering the highway, open to review by the court.⁸ The statute may, by implication, authorize a change in the mode of crossing,—as from one at grade to one by tunnel.⁹

Diversion of Highways.—The right to divert a highway is not easily implied. It is not inferred from a right to change its grade

¹ *Louisville & N. R. Co. v. State*, 3 Head, 523; *Danville, H., & W. R. Co. v. Commonwealth*, 73 Pa. St. 29; *Regina v. Great North of England R. Co.*, 9 Q. B. 315.

² *Miller v. Long Island R. Co.* (U. S. C. C., E. D. N. Y.), 10 Reporter, 197.

³ *Philadelphia, W., & B. R. Co. v. Maryland*, 20 Md. 157; *Little Miami R. Co. v. Greene County*, 31 Ohio St. 338; *Pettis v. Johnson*, 56 Ind. 139; *Bay State Brick Co. v. Foster*, 115 Mass. 431. See *Haskell v. New Bedford*, 108 Mass. 208; *West v. Louisville, C., & L. R. Co.*, 8 Bush, 404.

⁴ *Chicago, R. I., & P. R. Co. v. Joliet*, 79 Ill. 25; *Chicago & N. W. R. Co. v. People*, 91 Ill. 251.

⁵ *Commonwealth v. Hartford & N. H. R. Co.*, 14 Gray, 379.

⁶ *Little Miami R. Co. v. Greene County*, 31 Ohio St. 338; *ante*, Chap. VII. p. 155. Whether in a particular case it can cross longitudinally, or only at right angles, see *Long Branch Com'rs v. West End R. Co.*, 2 Stewart (N. J.), 566.

⁷ *People v. New York Cent. R. Co.*, 74 N. Y. 302, 12 Hun, 195; *Struthers v. Dunkirk, W., & P. R. Co.*, 87 Pa. St. 282; *ante*, Chap. VII. p. 149; *post*, Chap. IX. p. 255.

⁸ *Waterbury v. Hartford, P., & F. R. Co.*, 27 Conn. 146.

⁹ *Central R. Co. v. State*, 3 Vroom, 220.

at a crossing.¹ The diversion cannot be justified on the ground of mere economy in construction, but only on the ground of necessity or public convenience.² When the right to divert exists, it must be exercised reasonably, with due regard to the convenience and safety of travellers upon the highway.³

Duty to restore the Highway to its Original Condition.—The laying of a railroad across highways often requires excavations and erections, and a greater or less change in the surface. The duty, however, to restore the highway as far as may be to its former condition, and to erect and maintain structures necessary for such restoration, is presumed to be incumbent on the company, even without any express requirement imposed by statute.⁴

The duty to restore it to its former condition so as not to interfere materially with its usefulness, and to make the crossing safe and convenient for the public, is usually imposed by statute.⁵ It is a continuing duty,⁶ and binds other corporations which succeed to the ownership or possession of the railroad.⁷ It is to be substantially rather than literally performed.⁸ Whether it is to be performed with reference to the growth of the community, so as to require improvements and alterations adapted to the increased use of the highway, is a question to be determined by the terms and intent of the statute.⁹ Its performance may be

¹ *Warren R. Co. v. State*, 5 Dutcher, 353.

² *Norwich & W. R. Co. v. Killingly*, 25 Conn. 402; *Greenwich v. Easton & A. R. Co.*, 9 C. E. Green, 217; *Queen v. Wycombe R. Co.*, L. R. 2 Q. B. 310; *Fenwick v. East London R. Co.*, L. R. 20 Eq. Cas. 544; *Attorney-General v. Ely, H. & S. R. Co.*, L. R. 4 Ch. App. 194, L. R. 6 Eq. Cas. 106; *Pugh v. Golden Valley R. Co.*, L. R. 12 Ch. Div. 274; *ante*, Chap. VII. p. 203.

³ *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Potter v. Bunnell*, 20 Ohio St. 150; *Louisville & N. R. Co. v. State*, 3 Head, 523.

⁴ *Northern Cent. R. Co. v. Baltimore*, 46 Md. 425; *Eyler v. County Com'rs*, 49 Md. 257; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489, 502.

⁵ *Gear v. C. C. & D. R. Co.*, 43 Iowa, 83; *Hamden v. New Haven & N. Co.*, 27 Conn. 158; *Roberts v. Chicago & N. W.*

R. Co., 35 Wis. 679; *People v. New York Cent. & H. R. R. Co.*, 74 N. Y. 302, 12 Hun, 195; *Wasmer v. D. L. & W. R. Co.*, 80 N. Y. 212.

⁶ *Wellcome v. Leeds*, 51 Me. 313; *Central R. Co. v. State*, 3 Vroom, 220; *Chicago, R. I., & P. R. Co. v. Moffitt*, 75 Ill. 524; *Eyler v. County Com'rs*, 49 Md. 257.

⁷ *People v. Chicago & A. R. Co.*, 67 Ill. 118; *Little Miami R. Co. v. Greene County*, 31 Ohio St. 338; *Wasmer v. D. L. & W. R. Co.*, 10 N. Y. Week. Dig. 100, 80 N. Y. 212.

⁸ *Little Miami R. Co. v. Greene County*, 31 Ohio St. 338; *Roberts v. Chicago & N. W. R. Co.*, 35 Wis. 679.

⁹ *Burritt v. New Haven*, 42 Conn. 174; *State v. New Haven & N. Co.*, 45 Conn. 331; *Manley v. St. Helens, C., & R. Co.*, 2 Hurl. & N. 840. The company is not bound to erect screens or guards between its railroad and a highway, unless the

enforced by mandamus,¹ or in equity,² and its breach is punishable by indictment.³

The company is sometimes authorized to substitute a new highway for the old one, and it is a question of statutory construction whether it must open the new road for use before occupying the old one.⁴

Legislative Power over Highways.—The legislature, unless restricted by the State Constitution, may even, without the consent of a municipality, and without allowing it compensation, authorize railroads to be laid in its highways. If the city or town is deemed the owner of the fee, it holds the interest as trustee of the public, without title to compensation as a proprietor.⁵ The statute, however, may require the consent of the municipality.⁶

Limitations of Power of Municipal Corporations over Highways.—A municipal corporation cannot, by virtue of its ordinary powers, confer a franchise on individuals or a private corporation to lay

statute imposes the duty. *Coy v. Utica & S. R. Co.*, 23 Barb. 643.

¹ *People v. Green*, 58 N. Y. 152; *People v. New York Cent. & H. R. R. Co.*, 74 N. Y. 302; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *People v. Chicago & A. R. Co.*, 67 Ill. 118; *State v. Gorham*, 37 Me. 451.

² *Johnston v. Providence & S. R. Co.*, 10 R. I. 365.

³ *People v. New York Cent. & H. R. R. Co.*, 74 N. Y. 302, 12 Hun, 195; *State v. Gorham*, 37 Me. 451.

⁴ *Danville, H., & W. R. Co. v. Commonwealth*, 73 Pa. St. 29; *Louisville & N. R. Co. v. State*, 3 Head, 523; *Regina v. Scott*, 3 Q. B. 853; *Regina v. Great North of England R. Co.*, 9 Q. B. 315. See *Phillips v. Dunkirk, W., & P. R. Co.*, 78 Pa. St. 177.

⁵ *Morris & E. R. Co. v. Newark*, 2 Stock. 352; *Hinchman v. Paterson Horse R. Co.*, 2 C. E. Green, 75; *Jersey City v. Jersey City & B. R. Co.*, 5 C. E. Green, 360; *Paterson & P. H. R. Co. v. Paterson*, 9 C. E. Green, 158; *Phil. & T. R. Co., In re*, 6 Whart. 25; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339, 354; *Danville, H., & W. R. Co. v. Commonwealth*, 73 Pa. St. 29; *Struthers v. Dunkirk, W., & P. R. Co.*, 87 Pa. St. 282; *Tennessee &*

A. R. Co. v. Adams, 3 Head, 596; *Perry v. New Orleans, M., & C. R. Co.*, 55 Ala. 413; *People v. Kerr*, 27 N. Y. 188, 37 Barb. 357, 38 Barb. 369; *Kellinger v. Forty-Second St. R. Co.*, 50 N. Y. 206; *New York Cent. & H. R. R. Co., In re*, 77 N. Y. 248; *People v. Law*, 34 Barb. 494; *Brooklyn City & N. R. Co. v. Coney Island & B. R. Co.*, 35 Barb. 364; *New York & H. R. Co. v. Forty-Second St. R. Co.*, 50 Barb. 309; *Clinton v. Cedar Rapids & M. R. Co.*, 24 Iowa, 455; *Chicago, N., & S. W. R. Co. v. Newton*, 36 Iowa, 299; *Hone v. K. & D. M. R. Co.*, 42 Iowa, 636; *Council Bluffs v. Kansas City, St. J., & C. B. R. Co.*, 45 Iowa, 338; *Chicago, R. I., & P. R. Co. v. Joliet*, 79 Ill. 25; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *New Orleans, M., & C. R. Co. v. New Orleans*, 26 La. An. 517, 478. But see *Donnaher v. State*, 8 S. & M. 649. In Missouri, the legislature cannot, under the State Constitution, authorize railroads in streets without the consent of the municipal corporation. *Atlantic & P. R. Co. v. St. Louis*, 3 Mo. App. 315, 66 Mo. 228.

⁶ *Hickey v. Chicago & W. I. R. Co.*, 6 Brad. (Ill.) 172.

railroad tracks on highways, and to run cars upon them, and receive fares from passengers;¹ but it may derive the power by grant from the legislature, or its unauthorized exercise of the power may be ratified by statute.² When the power has been conferred, the courts will not supervise its exercise.³ The power conferred on a municipal corporation, to authorize a street railroad, does not include the power to make an exclusive grant.⁴ The right when granted will pass to a company, which succeeds by due authority of law to the franchises of the company to which the grant was made.⁵

A municipality cannot, where its assent is not required by the statute, impose conditions on a railroad company which has been authorized by the legislature to lay tracks in the streets.⁶ Where its assent is required, it may, it has been held, qualify the assent by conditions.⁷ The conditions of a license accepted by the company become a contract imposing a liability until the license is revoked.⁸ Where the statute authorizes the laying of rails on a highway, with the assent of the municipal body, such assent, when given, is irrevocable.⁹ Its power to assent has been held to be exhausted by a refusal to assent.¹⁰ The power of a city to

¹ *Davis v. New York*, 14 N. Y. 506, 3 Duer, 119, 2 Duer, 663; *Milbau v. Sharp*, 27 N. Y. 611, 15 Barb. 193, 28 Barb. 228; *New York & H. R. Co. v. New York*, 1 Hilton, 562; *Stuyvesant v. Pearsall*, 15 Barb. 244; *People v. New York & H. R. Co.*, 45 Barb. 73; *Hickey v. Chicago & W. I. R. Co.*, 6 Brad. (Ill.) 172; *People's R. Co. v. Memphis R. Co.*, 10 Wall. 38, 4 Cold. (Tenn.) 406; *Perry v. New Orleans, M., & C. R. Co.*, 55 Ala. 413; *Covington Street R. Co. v. Covington*, 9 Bush, 127; *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228, 3 Mo. App. 315; *Attorney-General v. Lombard & S. Sts. Pass. R. Co.*, 10 Phil. 352, 32 Leg. Int. 238. See *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *Pettis v. Johnson*, 56 Ind. 139. In Iowa, the city or town may permit the streets to be used for railroads operated by horse power, but not for those operated by steam power. *Stanley v. Davenport*, 6 Northwest. Rep. 706, 2 Northwest. Rep. 1064.

² *Clarke v. Blackmar*, 47 N. Y. 150; *People v. Law*, 34 Barb. 494; *Wetmore v. Law*, 34 Barb. 515; *Brown v. Duplessis*, 14 La. An. 842; *Chicago & N. W. R. Co. v. People*, 91 Ill. 251; *Quincy v. Chicago*,

B., & Q. R. Co., 92 Ill. 21; *Cairo & V. R. Co. v. People*, 92 Ill. 170; *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377.

³ *Cairo & V. R. Co. v. People*, 92 Ill. 170.

⁴ *State v. Cincinnati Gas Light & C. Co.*, 18 Ohio St. 262; *Cincinnati Street R. Co. v. Smith*, 29 Ohio St. 291.

⁵ *Quincy v. Chicago, B., & Q. R. Co.*, 94 Ill. 537.

⁶ *Council Bluffs v. Kansas City, St. J., & C. B. R. Co.*, 45 Iowa, 338. As to waiver of a condition by the city, see *Chicago City R. Co. v. People*, 73 Ill. 541.

⁷ *Pacific R. Co. v. Leavenworth City*, 1 Dillon, 393; *New York & H. R. Co. v. New York*, 1 Hilton, 562. See *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 5 C. E. Green, 61.

⁸ *Troy v. Troy & L. R. Co.*, 49 N. Y. 657. See *New York v. Second Av. R. Co.*, 34 Barb. 41; *Philadelphia v. Lombard & S. Sts. P. R. Co.*, 3 Grant, 403; *People's R. v. Memphis R.*, 10 Wall. 38.

⁹ *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. 358; *People's Pass. R. Co. v. Baldwin*, 37 Leg. Int. 424.

¹⁰ *Musser v. Fairmount & A. St. R. Co.*, 5 Pa. L. J. (Clark) 466.

regulate the use of streets by railroad companies is often expressly conferred,¹ and may be implied as included in its general power over streets.² A city is liable to a land-owner suffering special damage from the laying of a railroad in the highway which without legal authority it authorized to be laid.³

Underground and Elevated Railroads.—The legislature may authorize a railroad to be constructed under as well as upon highways; and, when so constructed, the rights of land-owners are determined by the same principles as if they were built upon the surface.⁴ It may also authorize "elevated railroads," or railroads running lengthwise upon structures raised above the highway.⁵ Authority to build tunnels under the streets of a city may be given by implication.⁶

Liability of the Company to Travellers on the Highway for Defective Crossings or laying of Tracks.—A railroad company which is authorized to cross highways is under a legal duty to construct its road across them in a reasonable manner, with reference to the double use of the crossing for its own purposes, and for those of ordinary travelling. It is bound to keep the crossing as safe and convenient for public travel as is practicable, and is liable to individuals using the highway for injuries caused by defects and obstructions created by it which could have been avoided with reasonable precautions.⁷ The same obligation rests upon a com-

¹ *Atlantic & P. R. Co. v. St. Louis*, 3 Mo. App. 815, 66 Mo. 228.

² *West Phil. Pass. R. Co. v. Philadelphia*, 10 Phil. 70.

³ *Stanley v. Davenport*, 2 Northwest. Rep. 604.

⁴ *Plant v. Long Island R. Co.*, 10 Barb. 26; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117. See *Hodgkinson v. Long Island R. Co.*, 4 Edw. Ch. 411; *Ramsden v. Manchester, S. J., & A. R. Co.*, 1 Exch. 723.

⁵ For various questions concerning this mode of "rapid transit" arising in New York, see *New York Elevated R. Co., In re*, 70 N. Y. 327, 7 Hun, 239, 3 Abbott N. C. 401; *Gilbert Elevated R. Co., In re*, 70 N. Y. 361, 9 Hun, 303; *People v. Stebbins*, 20 Hun, 26; *Kings County Elevated R. Co., In re*, 20 Hun, 217, 18 Hun, 378; *Sixth Avenue R. Co.*

v. Gilbert Elevated R. Co., 41 N. Y. Superior, 489, 43 N. Y. Superior, 292; *Haight v. New York Elevated R. Co.*, 49 How. Pr. 20; *Patten v. New York Elevated R. Co.*, 3 Abbott N. C. 306; *Ninth Avenue R. Co. v. New York Elevated R. Co.*, 3 Abbott N. C. 347; *Sixth Avenue R. Co. v. Gilbert Elevated R. Co.*, 3 Abbott N. C. 372; *Currier v. West Side Patent Elevated R. Co.*, 6 Blatch. 487.

⁶ *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117.

⁷ *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Gillett v. Western R. Co.*, 8 Allen, 560; *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Penn. & O. C. Co. v. Graham*, 63 Pa. St. 290; *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Burritt v. New Haven*, 42 Conn. 174; *People v. Chicago & A. R. Co.*, 67 Ill. 118; *Gale v. New York Cent. & H. R. R. Co.*, 76 N. Y. 594, 13 Hun, 1;

pany when under authority of law it lays a track upon and along the highway.¹

Liability of the City or Town for Injuries to Travellers on the Highway, caused by Defective Construction of Railroads upon or across the Highway.—A town or city which is by law bound to keep the highway safe and convenient for public travel is not relieved of the duty by the fact that the defects or obstructions were caused by a railroad company, where it has the power to remove them; but it remains liable to travellers who suffer injury from such defects and obstructions, even though the injured person has also a right of action against the company.² The town or city is not, however, liable where it has no power to remove the obstruction;³ and it is not liable for injuries caused by the unlawful running of trains.⁴ Some statutes expressly or by construction relieve the town entirely from responsibility for defects in the works lawfully constructed by the company on highways, and place it exclusively on the company.⁵

Liability of the Company to indemnify the City or Town.—A city or town which has been compelled to pay damages for injuries caused by the default of the company, may recover the amount of the company, including, where proper notice has been given of the pendency of the suit, costs and expenses.⁶ This right to

Lyon v. St. Louis, I. M., & S. R. Co., 6 Mo. App. 516. The company is not liable directly to an individual for mere non-feasance in making a proper crossing. *Buck v. Conn. & P. R. R. Co.*, 42 Vt. 370.

¹ *Fash v. Third Av. R. Co.*, 1 Daly, 148; *Worster v. Forty-Second Street & G. S. R. Co.*, 50 N. Y. 203; *Cuddeback v. Jewett*, 20 Hun, 187.

² *Davis v. Leominster*, 1 Allen, 182; *Proprietors of Locks & Canals v. Lowell Horse R. Co.*, 109 Mass. 221; *Johnson v. Salem, T., & C. B. Co.*, 109 Mass. 522; *Hawks v. Northampton*, 116 Mass. 420; *Batty v. Duxbury*, 24 Vt. 155; *Wellcome v. Leeds*, 51 Me. 313; *People v. Brooklyn*, 65 N. Y. 349; *Wilson v. Watertown*, 3 Hun, 508; *Norristown v. Moyer*, 67 Pa. St. 355; *Philadelphia v. Weller*, 4 Brewster, 24; *Hamden v. New Haven & N. Co.*, 27 Conn. 158; *Lee v. Barkhamstead*, 46

Conn. 213; *Swenson v. Lexington*, 69 Mo. 157; *Eyler v. County Com'rs*, 49 Md. 257; *Watson v. Tripp*, 11 R. I. 98.

³ *Jones v. Waltham*, 4 Cush. 299; *Davis v. Leominster*, 1 Allen, 182; *Young v. Yarmouth*, 9 Gray, 386; *Johnson v. Salem, T., & C. B. Co.*, 109 Mass. 522.

⁴ *Vinal v. Dorchester*, 7 Gray, 421.

⁵ *Sawyer v. Northfield*, 7 Cush. 490; *White v. Quincy*, 97 Mass. 430. See *Burritt v. New Haven*, 42 Conn. 174; *Lee v. Barkhamstead*, 46 Conn. 213.

⁶ *Lowell v. Boston & L. R. Co.*, 23 Pick. 24; *Proprietors of Locks & Canals v. Lowell Horse R. Co.*, 109 Mass. 221; *Woburn v. Boston & L. R. Co.*, 109 Mass. 283; *State v. Gorham*, 37 Me. 451; *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Portland v. Atlantic & St. L. R. Co.*, 66 Me. 485; *Hamden v. New Haven & N. Co.*, 27 Conn. 158; *Wilson v. Watertown*, 3 Hun, 508; *Batty v. Duxbury*, 24 Vt. 155.

recover over of the company has been sustained where its duty was based on a contract with the municipal corporation.¹

If a railroad company is bound to keep a highway crossing in repair, and refuses to perform the duty, the officers of the city or town who are bound to see that it is kept safe for travel may repair it, and recover the expense of the corporation.²

Bridges over Highways. — The word "bridge," in statutes which require a railroad company to build and keep in repair bridges at crossings of highways, has been defined to mean the entire structure, including the approaches, although a part of the structure may be outside of the location.³ The term "bridge," in statutes, is not confined to structures for crossing waters, but signifies as well crossings of public ways on land.⁴ A crossing includes an embankment, which is a necessary part of it.⁵

Remedies for Unlawful Use of the Highway. — A land-owner may, irrespective of the ownership of the fee, maintain an action for unlawful obstructions of the highway causing him special damage, as for the laying of a railroad upon it without authority of law, or in a manner not authorized,⁶ and may also maintain ejectment against parties unlawfully occupying a highway the fee of which belongs to him.⁷ The land-owner may waive his right to object to the laying of the railroad on a highway.⁸ He may maintain an action for an unskilful construction of a railroad on the highway, whereby he suffers damage.⁹ He may recover against the

¹ *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *McMahon v. Second Av. R. Co.*, 75 N. Y. 231, 11 Hun, 347; *Lowery v. Brooklyn City & N. R. Co.*, 76 N. Y. 28.

² *Penn. R. Co. v. Duquesne Borough*, 46 Pa. St. 223; *Wellcome v. Leeds*, 51 Me. 313.

³ *Parker v. Boston & M. R.*, 3 Cush. 107; *Commonwealth v. Deerfield*, 6 Allen, 449, 455; *Titcomb v. Fitchburg R. Co.*, 12 Allen, 254; *White v. Quincy*, 97 Mass. 430; *Burritt v. New Haven*, 42 Conn. 174; *Hayes v. New York Cent. & H. R. R. Co.*, 6 Hun, 63.

⁴ *State v. Gorham*, 37 Me. 451.

⁵ *Farley v. C. R. I. & P. R. Co.*, 42 Iowa, 234.

⁶ *Park v. C. & S. W. R. Co.*, 43 Iowa, 636; *Hatfield v. Central R. Co.*, 4 Vroom,

251; *Parrot v. Cincinnati, H., & D. R. Co.*, 3 Ohio St. 330; *Hopkins v. Western Pacific R. Co.*, 50 Cal. 190; *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Park v. C. & S. W. R. Co.*, 43 Iowa, 636; *Stange v. Hill*, 7 Northwest. Rep. 115. See *Black v. Phil. & R. R. Co.*, 58 Pa. St. 249.

⁷ *Carpenter v. Oswego & S. R. Co.*, 24 N. Y. 655; *Henderson v. New York Cent. R. Co.*, 17 Hun, 344; *Weisbrod v. Chicago & N. R. Co.*, 21 Wis. 602; *Phillips v. Dunkirk, W., & P. R. Co.*, 78 Pa. St. 177. See *Sweet v. Buffalo, N. Y., & P. R. Co.*, 13 Hun, 643.

⁸ *State v. Atlantic City*, 5 Vroom, 99; *Haskell v. New Bedford*, 108 Mass. 208.

⁹ *Cadle v. Muscatine W. R. Co.*, 44 Iowa, 11.

company for obstructing the highway by its trains contrary to statute, upon proof of an injury caused by its default.¹

A railroad laid upon or across a highway,² or a turnpike,³ without legal authority, or in a manner not authorized, is indictable as a nuisance; but when duly constructed under such authority it is not indictable, although it may obstruct travel on the highway.⁴ The nuisance may be enjoined at the instance of a person suffering special damage;⁵ or of the municipal authorities having the control of the highway;⁶ or of the proper law-officer of the State, who may file an information *ex officio*, or on the relation of persons having an interest.⁷

Mandamus lies on the petition of the city or town, where there is no other adequate remedy, to compel the company to erect structures, and construct and maintain its road upon or across highways in the manner required by statute.⁸

¹ Hall v. Brown, 54 N. H. 495, 58 N. H. 93.

² Commonwealth v. Nashua & L. R. Co., 2 Gray, 54; Commonwealth v. New Bedford Bridge, 2 Gray, 339; Commonwealth v. Vt. & M. R. Co., 4 Gray, 22; Commonwealth v. Old Colony & F. R. R. Co., 14 Gray, 93; Central R. Co. v. State, 3 Vroom, 220; Davis v. New York, 14 N. Y. 506, 525; Regina v. Great North of England R. Co., 9 Q. B. 315; Regina v. Wilson, 18 Q. B. 348.

³ Northern Central R. Co. v. Commonwealth, 9 Weekly Notes of Cases, 129.

⁴ Hinchman v. Paterson Horse R. Co., 2 C. E. Green, 75; Danville, H., & W. R. Co. v. Commonwealth, 73 Pa. St. 29; Chicago, R. I., & P. R. Co. v. Joliet, 79 Ill. 25; Hentz v. Long Island R. Co., 13 Barb. 646; *post*, Chap. X. p. 267.

⁵ Brainard v. Conn. River R. Co., 7 Cush. 506; Haskell v. New Bedford, 108 Mass. 208; Hartshorn v. South Reading, 3 Allen, 501; Zabriskie v. Jersey City & B. R. Co., 2 Beas. 314; Higbee v. Camden & A. R. Co., 4 C. E. Green, 276; People v. Sturtevant, 9 N. Y. 263; Davis v. New York, 14 N. Y. 506; Mulhau v. Sharp, 27 N. Y. 611, 15 Barb. 193, 17 Barb. 435, 28 Barb. 228; Clarke v. Blackmar, 47 N. Y. 150; Wetmore v. Story, 22 Barb. 414; Pettis v. Johnson, 56 Ind. 139; Hickey v. Chicago & W. I. R. Co., 6 Brad. (Ill.) 172; Osborne v. Brooklyn City R. Co., 5 Blatch.

366; Miller v. Long Island R. Co. (U. S. C. C., E. D.), 10 Reporter, 197. Whether owners of distinct parcels of real estate may join in a bill to enjoin a nuisance common to all, see Hinchman v. Paterson Horse R. Co., 2 C. E. Green, 75; Morris & E. R. Co. v. Prudden, 5 C. E. Green, 530; Cadigan v. Brown, 120 Mass. 493; *post*, Chap. X. p. 269.

⁶ Springfield v. Conn. River R. Co., 4 Cush. 63; Greenwich v. Easton & A. R. Co., 9 C. E. Green, 217; Johnston v. Providence & S. R. Co., 10 R. I. 365; Rio Grande R. Co. v. Brownsville, 45 Tex. 88. See Sheboygan v. Sheboygan & F. R. Co., 21 Wis. 667.

⁷ District Attorney v. Lynn & B. R. Co., 16 Gray, 242; Attorney-General v. Metropolitan R. Co., 125 Mass. 515; Davis v. New York, 14 N. Y. 506, 526; Higbee v. Camden & A. R. Co., 4 C. E. Green, 276; Attorney-General v. Delaware & B. B. R. Co., 12 C. E. Green, 1, 631; Attorney-General v. Lombard & S. Sts. Pass. R. Co., 10 Phil. 352. The proceeding, though instituted on the relation of private persons, is under the control of the law officer who filed it. People v. Central Cross-Town R. Co., 21 Hun, 476.

⁸ Cambridge v. Charlestown Branch R. Co., 7 Met. 70; State v. Gorham, 37 Me. 451; Indianapolis & C. R. Co. v. State, 37 Ind. 489.

A town or city, which is bound to maintain highways, has been held to have such an interest in them, and in bridges and structures forming a part of them, as to entitle it to maintain an action against a railroad company for injuries to them.¹

Street Railway Companies. Respective Rights of the Company, and of the Public in the Use of the Street. — A street-railway company owns the structure laid by it on the highway, and has a superior right to the space covered by its track. Its cars are confined to a fixed line of movement, and upon that line have precedence over other carriages which can pass on the remaining surface of the highway.² The public on foot or in carriages may cross its track, and travel on the space covered by it when its cars are not passing, and even incidentally, though not to the obstruction or inconvenience of the railway cars, drive ordinary carriages upon its rails. A person driving his carriage on the track should keep on the lookout for the railway cars, so as to leave the track without retarding their movement.³ The company, in the exercise of this superior, though not exclusive, right to its track must use the reasonable care allowed by its mode of movement so as not to injure persons lawfully using the street in other ways, and similar care is incumbent on such persons.⁴ Having a property in the structure which it has laid for its purposes, and also a franchise, its rails cannot be used by other competing common carriers driving railway or other carriages, without special legislative authority. Such a use is a direct interference with its franchise, entitling it to compensation,

¹ *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Hooksett v. Amoskeag Man. Co.*, 44 N. H. 105; *Greenwich v. Easton & A. R. Co.*, 9 C. E. Green, 217, 220.

² *Commonwealth v. Temple*, 14 Gray, 69; *Commonwealth v. Hicks*, 7 Allen, 573; *State v. Foley*, 31 Iowa, 527; *Jatho v. Green & C. St. Pass. R. Co.*, 4 Phil. 24; *Hegan v. Eighth Av. R. Co.*, 15 N. Y. 380; *Adolph v. Central Park, N. & E. R. R. Co.*, 76 N. Y. 530, 65 N. Y. 554, 33 N. Y. Superior, 186, 43 N. Y. Superior, 199; *Barker v. Hudson River R. Co.*, 4 Daly, 274.

³ *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 5 C. E. Green, 61, 69; *Wilbrand v. Eighth Av. R. Co.*, 3 Bosw. 314; *Fettrick v. Dickinson*, 22 How. Pr. 248; *Hegan v. Eighth Av. R.*

Co., 15 N. Y. 380; *Adolph v. Central Park, N. & E. R. Co.*, 76 N. Y. 530, 65 N. Y. 554, 33 N. Y. Superior, 186, 43 N. Y. Superior, 199; *Chicago W. D. R. Co. v. Bert*, 69 Ill. 388.

⁴ *Shea v. Portrero & B. V. R. Co.*, 44 Cal. 414; *Lynam v. Union R. Co.*, 114 Mass. 83; *Unger v. Forty-Second St. R. Co.*, 51 N. Y. 497; *Shea v. Sixth Av. R. Co.*, 62 N. Y. 180; *Baxter v. Second Av. R. Co.*, 3 Rob. 510; *Adolph v. Central Park, N. & E. R. R. Co.*, 33 N. Y. Superior, 186, 43 N. Y. Superior, 199, 65 N. Y. 554, 76 N. Y. 530; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. 358; *Commonwealth v. Temple*, 14 Gray, 69; *Meyer v. Lindell R. Co.*, 6 Mo. App. 27; *Pendleton St. R. Co. v. Stallman*, 21 Ohio St. 1.

and differs essentially from an incidental use of its rails by the general public.¹ The grant to a street-railway company is not by implication exclusive, and a grant may afterwards be made to another company to use other parts of the street for a competing line, without compensation being made for the injury to the earlier grant arising from such competition.² The municipal authorities retain the control of highways on which street railways are laid, and may make necessary repairs and improvements of the highway, which cause a temporary inconvenience or obstruction to the movements of the railway cars.³

The State retains its police power to require of corporations already created further safeguards in the crossing and use of streets.⁴ A license by a charter to a street-railroad company to make a connection with another railroad owned by a city, does not involve a guaranty that the city shall maintain the railroad with which the connection is to be made.⁵

The power to lay a double track in a street may be exercised by laying one track at one time, and the other subsequently.⁶ The power to lay such a track is presumed to mean two sets of tracks upon the same location, so that cars can be run on the same route in opposite directions, and not two sets of tracks in different streets.⁷

The company may remove snow from its track to another part of the street, but it must exercise the right reasonably, avoiding unnecessary injury to the owners of property.⁸

¹ *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen, 262; *Sixth Av. R. Co. v. Kerr*, 72 N. Y. 330, 45 Barb. 138; *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 5 C. E. Green, 61; *Camden Horse R. Co. v. Citizens Coach Co.*, 1 Stewart (N. J.), 145, 2 Stewart (N. J.), 299, 4 Stewart (N. J.), 525; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. 358; *Buffalo Street R. Co. v. Leighton*, 10 Reporter, 149; *Central City Horse R. Co. v. Ft. Clark R. Co.*, 81 Ill. 523; *ante*, Chap. VII. pp. 194, 217, 218. Statutes provide for the use by one street railroad company of another company's track, by paying compensation. *Brooklyn, W., & N. R. Co.*, 72 N. Y. 245, 19 Hun, 314.

² *New York & H. R. Co. v. Forty-*

Second St. R. Co., 50 Barb. 285, 309; *Sixth Avenue R. Co. v. Gilbert Elevated R. Co.*, 43 N. Y. Superior, 292, 41 N. Y. Superior, 489; *Canyonville & G. Road Co. v. Stephenson*, 8 Oreg. 263. See *Market St. R. Co. v. Central R. Co.*, 51 Cal. 583.

³ *Middlesex R. Co. v. Wakefield*, 103 Mass. 261.

⁴ *Veazie v. Mayo*, 45 Me. 560, 49 Me. 156.

⁵ *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 314.

⁶ *People's Pass. R. Co. v. Baldwin*, 37 Leg. Int. 424.

⁷ *People v. New York & H. R. Co.*, 45 Barb. 73.

⁸ *Short v. Balt. City Pass. R. Co.*, 50 Md. 73.

CHAPTER IX.

THE LOCATION.

Choice of Location.—The charter or special legislative act creating the corporation may define in detail the location;¹ or indicate the termini and general route, leaving the company to fix its line within certain limits in some plan to be recorded;² or, as under general railroad laws, the general and particular location may be left to the determination of the corporation, subject to the approval or revision of certain public authorities.³ Whether a charter justifies a certain location, and whether a recorded location applies to particular land, is a question for judicial construction.

Where only the general termini and route are prescribed by the legislature, the location in other respects, including the precise termini and intermediate points, is usually left to the election of the company; and the exercise of its discretion, where it acts in good faith and within the limits of its powers, cannot be reviewed by the courts.⁴ But the company cannot abuse such discretion and depart from the purpose of its charter by building another railroad than that intended by the legislature.⁵

Power of Choice, when exhausted. Change of Location.—The power of the company to determine its location, when once exercised, is exhausted. It may have a discretion as to its termini or the selection of its intermediate points, or its route

¹ Coney Island & B. R. Co., *In re*, 12 Hun, 451.

² Boston Water Power Co. v. Boston & W. R. Co., 23 Pick. 360; *ante*, Ch. VII. p. 147.

³ Boston & M. R. v. Lowell & L. R., 124 Mass. 368; *ante*, Chap. VII. pp. 147, 148.

⁴ Hentz v. Long Island R. Co., 13 Barb. 646; *People v. New York Cent. & H. R. R. Co.*, 74 N. Y. 302, 12 Hun, 195; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St.

325; *Parke's Appeal*, 64 Pa. St. 137; *Struthers v. Dunkirk, W., & P. R. Co.*, 87 Pa. St. 282; *Newcastle & R. R. Co. v. Peru & I. R. Co.*, 3 Ind. 464; *Southern Minn. R. Co. v. Stoddard*, 6 Minn. 150; *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen, 221.

⁵ *Brigham v. Agricultural Branch R. Co.*, 1 Allen, 316; *Commonwealth v. Franklin Canal Co.*, 21 Pa. St. 117; *Central R. Co. v. Penn. R. Co.*, 4 Stewart (N. J.), 475, 6 Stewart (N. J.), 755.

between certain fixed points, but, having exercised the discretion, it cannot change the location without legislative authority. This is in accordance with the ancient rule of the common law, that, "if a man once determines his election, it shall be determined forever."¹

The power to change the location, to a certain extent, is sometimes given by statute;² but when given, it is to be strictly construed. Thus, an authority to vary the route and change the location after a selection, is construed not to be an authority to change the location after the road is constructed.³ A power to change the route does not include the power to change the terminal points.⁴ The power to lay double tracks is not exhausted by the laying of one set, and may be used subsequently to lay another set.⁵

Expiration of Power. — The power of the company to take lands may be determined by the expiration of the time within which, by the charter, it is required to be exercised.⁶ But the language of the statute may be comprehensive enough to authorize the condemnation of land after the completion of the road, when required for its maintenance and operation.⁷ Thus, where

¹ Com. Dig. tit. "Election," C. 2; *State v. Norwalk & D. Turnp. Co.*, 10 Conn. 157; *Turnpike Soc. v. Hosmer*, 12 Conn. 361, 364; *Hudson & D. C. Co. v. New York & E. R. Co.*, 9 Paige, 323; *Mason v. Brooklyn City & N. R. Co.*, 35 Barb. 373; *People v. New York & H. R. Co.*, 45 Barb. 73; *Doughty v. Somerville & E. R. Co.*, 1 Zab. 442, 459; *Morris & E. R. Co. v. Central R. Co.*, 2 Vroom, 205; *Louisville & N. Branch Turnp. Co. v. Nashville & K. Turnp. Co.*, 2 Swan (Tenn.), 282; *Mine Hill & S. H. R. Co. v. Lippincott*, 86 Pa. St. 468; *Atlantic & P. R. Co. v. St. Louis*, 3 Mo. App. 315, 66 Mo. 228, 248; *Brigham v. Agricultural Branch R. Co.*, 1 Allen, 316; *Kenton County Court v. Bank Lick Turnp. Co.*, 10 Bush, 529; *Blakemore v. Glamorgan-shire Canal Co.*, 1 My. & Keene, 154, 1 Cl. & Fin. 262, 3 You. & Jerv. 60, 1 Am. Rail. Cas. 151, notes. See *Works v. Junction R. Co.*, 5 M'Lean, 425; *South Carolina R. Co.*, *In re*, 2 Rich. 434; *South Carolina R. Co. v. Blake*, 9 Rich. 228; *Mississippi & T. R. Co. v. Devaney*, 42 Miss. 555.

² *Boston & P. R. Corp. v. Midland R.*

Co., 1 Gray, 340; *Hudson River R. Co. v. Outwater*, 3 Sand. 639; *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa, 437. See *Baltimore & S. R. Co. v. Compton*, 2 Gill, 20, where a landowner brought an action of damages for removal of the location from his land.

³ *Moorhead v. Little Miami R. Co.*, 17 Ohio, 340; *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235; *Atkinson v. Marietta & C. R. Co.*, 15 Ohio St. 21.

⁴ *Attorney-General v. West Wisconsin R. Co.*, 36 Wis. 466.

⁵ *Philadelphia, W., & B. R. Co. v. Williams*, 54 Pa. St. 103; *People's Pass. R. Co. v. Baldwin*, 37 Leg. Int. 424.

⁶ *Peavey v. Calais R. Co.*, 30 Me. 498; *Morris & E. R. Co. v. Central R. Co.*, 2 Vroom, 205; *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228, 250, 3 Mo. App. 315; *Illinois Cent. R. Co. v. Rucker*, 14 Ill. 353; *Regina v. London & N. W. R. Co.*, 16 Q. B. n. s. 864; *ante*, Chap. VII. p. 145.

⁷ *Childs v. Central R. Co.*, 4 Vroom, 323; *Phil., W., & B. R. Co. v. Williams*, 54 Pa. St. 103; *Farnham v. Del. & H. C.*

a railroad company was authorized to "maintain and continue a railroad, with a single and double track, and with such appendages as may be deemed necessary for the convenient use of the same," it was held that the power to acquire land by condemnation for workshops, and whatever is included in the term "appendages," is not exhausted by an apparent completion of the road, where the increase of its business requires land for those purposes.¹ The power to build branches has been held to expire with the power to build the original or main road.²

Identity of the Property taken. Certainty in the Description of the Location. — A written description, usually called the location or survey, duly verified and deposited or recorded, as required by statute, in most jurisdictions determines finally, by metes and bounds, the particular property taken,³ and becomes the permanent record evidence of the amount taken, which cannot be controlled by extrinsic proof.⁴ This description, aided by maps and documents, properly referred to, must identify clearly the property taken, and show with reasonable certainty the limits of the taking. The owner is entitled to know precisely what is taken and what is left.⁵ A plan or map, referred to, may be used to explain the written description, and to aid it when it is defective;⁶ but the plan, in order to assist the description, must be

Co., 61 Pa. St. 265; *Selden v. Del. & H. C. Co.*, 29 N. Y. 634; *ante*, Chap. VII. pp. 151, 152.

¹ *Chicago, B., & Q. R. Co. v. Wilson*, 17 Ill. 123; *Toledo & W. R. Co. v. Daniels*, 16 Ohio St. 390; *ante*, Chap. VII. pp. 150, 151.

² *Morris & E. R. Co. v. Central R. Co.*, 2 Vroom, 205; *Atlantic & P. R. Co. v. St. Louis*, 3 Mo. App. 315, 325, 66 Mo. 228. See *Pittsburg v. Penn. R. Co.*, 48 Pa. St. 355.

³ *Baker v. Gee*, 1 Wall. 333; *Pacific R. Co. v. Lindell*, 39 Mo. 329; *Western Pacific R. Co. v. Tevis*, 41 Cal. 489; *Morris & E. R. Co. v. Blair*, 1 Stock. 635; *Coe v. New Jersey Midland R. Co.*, 4 Stewart (N. J.), 105, 146.

⁴ *Hazen v. Boston & M. R.*, 2 Gray, 574; *Lowell & L. R. Co. v. Boston & L. R. Co.*, 7 Gray, 27.

⁵ *Strang v. Beloit & M. R. Co.*, 16 Wis. 635; *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391; *Kohlhepp v. West*

Roxbury, 120 Mass. 596; *Penn. R. Co. v. Porter*, 29 Pa. St. 165; *Heise v. Penn. R. Co.*, 62 Pa. St. 67; *Vail v. Morris & E. R. Co.*, 1 Zab. 189; *New York & B. R. Co.*, *In re*, 62 Barb. 85; *State v. Armell*, 8 Kan. 288; *Atlantic & O. R. Co. v. Sullivan*, 5 Ohio St. 276; *Callender v. Painesville & H. R. Co.*, 11 Ohio St. 516; *Cleveland & T. R. Co. v. Prentice*, 13 Ohio St. 373; *State v. Bailey*, 19 Ind. 452; *Prather v. Jeffersonville, M., & I. R. Co.*, 52 Ind. 16, 40; *Anderson, L., & St. L. R. Co. v. Kernodle*, 54 Ind. 314, 318; *ante*, Chap. VII. p. 180.

⁶ *Hazen v. Boston & M. R.*, 2 Gray, 574; *Andover v. County Com'rs*, 5 Gray, 393; *Grand Junction, R., & D. Co. v. County Com'rs*, 14 Gray, 553; *Pinkerton v. Boston & A. R. Co.*, 109 Mass. 527; *Hunt v. Smith*, 9 Kan. 137; *Quincy, M., & P. R. Co. v. Kellogg*, 54 Mo. 334. See *Mason v. Brooklyn City & N. R. Co.*, 35 Barb. 373; *Vail v. Morris & E. R. Co.*, 1 Zab. 189.

intelligible without the aid of parol evidence,¹ and must be referred to in the description.² Another paper, although not annexed, may by reference be made a part of the instrument which contains the description, and supply its defects.³ The quantity is sufficiently definite when it can be calculated from courses and distances stated on a plan which is a part of the report made by the viewers.⁴ Where a map is required by statute, it should be sufficiently exact and complete, and capable, by application to the land, of defining precisely what is taken.⁵ Possession taken by the company, and acquiesced in by the landowner, will give certainty to an ambiguous description.⁶ The erection of visible and substantial monuments has sometimes been required.⁷

A survey, followed by occupancy, for the purpose of constructing a railroad, may determine the location, so as to give a priority against other companies attempting to appropriate the land within it.⁸

Conflicting Grants. Priority of Location.—Where the grants of a definite location made by the State are inconsistent, the earlier one will prevail.⁹ But if there is no conflict on the face of the charters,—as in the case of a general power to build a railroad between two points, with the right of selecting the particular route,—the title to specific land will be with the company which has priority in taking the land and perfecting its location.¹⁰ Where, under general laws, individuals may create a railroad corporation and obtain a location by agreement with certain public authorities, a corporation so organized cannot take land

¹ *Portland, S., & P. R. Co. v. County Com'rs*, 65 Me. 292.

² *Wilson v. Lynn*, 119 Mass. 174.

³ *Washington Park Com'rs, In re*, 52 N. Y. 131.

⁴ *Penn. R. Co. v. Bruner*, 55 Pa. St. 318.

⁵ *New York & B. R. Co., In re*, 62 Barb. 85; *Converse v. Grand Rapids & I. R. Co.*, 18 Mich. 459.

⁶ *Drury v. Midland R. Co.*, 127 Mass. 571, 578; *Duck River Valley N. G. R. Co. v. Cochrane*, 3 Lea (Tenn.), 478.

⁷ *Northern R. Co. v. Concord & C. R. Co.*, 27 N. H. 183; *Vail v. Morris & E. R. Co.*, 1 Zab. 189.

⁸ *Denver & R. G. R. Co. v. Cañon City & S. J. R. Co.*, 99 U. S. 463, 101 U. S. 711; *Atchison, T., & S. F. R. Co. v. Mecklim*, 23 Kan. 167.

⁹ *Chesapeake & O. Canal Co. v. Balt. & O. R. Co.*, 4 Gill & J. 1, 144; *Morris & E. R. Co. v. Blair*, 1 Stock. 635, 644.

¹⁰ *Morris & E. R. Co. v. Blair*, 1 Stock. 635, 644; *Waterbury v. Dry Dock, E. B., & B. R. Co.*, 54 Barb. 388; *Coe v. New Jersey Midland R. Co.*, 4 Stewart (N. J.), 105, 146; *Denver & R. G. R. Co. v. Cañon City & S. J. R. Co.*, 99 U. S. 463, 101 U. S. 711.

already appropriated for the location of another company.¹ If a narrow defile is a necessary route for two companies, the court, while the location will belong to the company which has priority, will make proper orders authorizing the other company to use the track upon just and equitable terms.²

Construction of Statutes granting a Location.—Statutes defining a location should have a reasonable construction with reference to the subject-matter and the public object of the grant.³ A charter which authorizes the construction of a railroad “to the place of shipping lumber,” on a tide-water river, does not limit the location to the upland or to the shore, but authorizes the extension of the road across the flats and over tide-water to a convenient place for reaching vessels.⁴ The extension of the boundaries of a city or town, named as a part of the location, does not enlarge the powers of the company, but the location remains limited to the municipality as bounded at the time the grant was made.⁵ The mere enumeration of certain places through which the road is to pass does not require that it shall pass through them in the order named.⁶

Meaning of Various Terms used in defining Routes and Termini.—The terms “beginning or ending *at*” a place, and the terms “beginning *from*” and “running *to*” it, are inclusive, and, unless a contrary intent appears from the statute, they authorize a location *within* such place.⁷ A grant of power to build a railroad

¹ Boston & M. R. v. Lowell & L. R. Co., 124 Mass. 368; *ante*, Chap. VII. pp. 154–157.

² Denver & R. G. R. Co. v. Cañon City & S. J. R. Co., 99 U. S. 463, 101 U. S. 711. See Springfield v. Conn. River R. Co., 4 Cush. 63, 72; Lathrop v. Junction R. Co., 4 Fed. Rep. 41.

³ Farmers' Turnp. Road v. Coventry, 10 Johns. 389; Cleveland & P. R. Co. v. Speer, 56 Pa. St. 325; Morris & E. R. Co. v. Central R. Co., 2 Vroom, 205. Petitions and plans presented to the legislature are not admissible to affect the construction of the charter. Commonwealth v. Fitchburg R. Co., 8 Cush. 240; Boston & P. R. Co. v. Midland R. Co., 1 Gray, 340, 366.

⁴ Peavey v. Calais R. Co., 30 Me. 498.

⁵ Commonwealth v. Erie & N. E. R. Co., 27 Pa. St. 339; People v. Detroit & H. Plank Road Co., 37 Mich. 195.

⁶ Commonwealth v. Fitchburg R. Co., 8 Cush. 240.

⁷ Farmers' Turnp. Road v. Coventry, 10 Johns. 389; Mohawk Bridge Co. v. Utica & S. R. Co., 6 Paige, 554; Mason v. Brooklyn City & N. R. Co., 35 Barb. 373; Union Pacific R. Co. v. Hall, 91 U. S. 343; Moses v. Pittsburg, Ft. W., & C. R. Co., 21 Ill. 516; Commonwealth v. Erie & N. E. R. Co., 27 Pa. St. 339; Tennessee & A. R. Co. v. Adams, 3 Head, 596; Rio Grande R. Co. v. Brownsville, 45 Tex. 88; Hazlehurst v. Freeman, 52 Ga. 244. But see North Eastern R. Co. v. Barker, 8 Rich. 177. It has been held that, under the general railroad law of New Jersey, both termini may be within the same city

“between” two places carries the right to extend it into each place.¹ The power to construct a railroad “along” a river authorizes its construction by the side but not upon the bed of the river.²

Burden of Proof on the Company in justifying its Acts as being within the Location. — The burden of proof is on the company, in justifying an entry for the construction of its railroad, to show that it was made on land included within the location.³ The filing of the location, as required by statute, is in some States deemed the act of taking, although the company is allowed on certain conditions to enter at an earlier period for the purpose of constructing the road; and it becomes liable in trespass for an entry on land if it does not file the location as required by statute, or if the location, as filed, does not cover the land entered upon.⁴

Purposes for which the Location may be used. — The estate or interest of the company, and the uses to which it may apply its location, have been treated in an earlier chapter.⁵

or town. *Long Branch Com'rs v. West End R. Co.*, 2 Stewart (N. J.), 566; *National Docks R. Co. v. Central R. Co.*, 5 Stewart (N. J.), 755, 4 Stewart (N. J.), 475. For the construction of the term “near,” see *Parke's Appeal*, 64 Pa. St. 137; *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige, 554; *Warner v. Callender*, 20 Ohio St. 190. For the construction of the term “at,” see *State v. Receiver of Taxes*, 9 Vroom, 299; *Mason v. Brooklyn City & N. R. Co.*, 35 Barb. 373; *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige, 554. For the construction of the terms “at or near,” or “within or near,” see *Fall River Iron Works v. Old Colony & F. R. R. Co.*, 5 Allen, 221; *State v. Hudson Tunnel R. Co.*, 9 Vroom, 548; *Central R. Co. v. Penn. R. Co.*, 4 Stewart (N. J.), 475, 5 Stewart (N. J.), 755. The term “near” has been held so indefinite as to make the description of a particular location fatally defective. *Indianapolis & V. R. Co. v. Newsum*, 54 Ind. 121; *De Long v. Schimmel*, 58 Ind. 64. “Or” may be construed to mean “and.” *Attorney-General v. West Wisconsin R. Co.*, 36 Wis. 466. For the

construction of statute provisions authorizing “connections” with other railroads, see *Cleveland, P., & A. R. Co. v. Erie*, 27 Pa. St. 380; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325; *Parke's Appeal*, 64 Pa. St. 137; *Pennock v. Coe*, 23 How. 117; *Attorney-General v. Delaware & B. B. R. Co.*, 12 C. E. Green, 631, 645; *Long Branch Com'rs v. West End R. Co.*, 2 Stewart (N. J.), 566; *Chicago, B., & Q. R. Co. v. Chamberlain*, 84 Ill. 333.

¹ *Morris & E. R. Co. v. Central R. Co.*, 2 Vroom, 205, 212.

² *Stevens v. Erie R. Co.*, 6 C. E. Green, 259.

³ *Hazen v. Boston & M. R.*, 2 Gray, 574; *New York & B. R. Co., In re*, 62 Barb. 85; *Atlantic & O. R. Co. v. Sullivan*, 5 Ohio St. 276; *Crawfordsville & W. R. Co. v. Wright*, 5 Ind. 252. Proof of actual enjoyment and use is sufficient in criminal cases. *Commonwealth v. Hicks*, 7 Allen, 573.

⁴ *Hazen v. Boston & M. R.*, 2 Gray, 574; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Lund v. New Bedford*, 121 Mass. 286; *ante*, Chap. VII. pp. 209, 210.

⁵ Chap. VII. pp. 157-161.

Title to Location as affected by Non-user, Misuser, and Adverse Use.—The company's right to its location is not defeated or impaired by a non-user;¹ nor is the discontinuance of certain trains a cause of forfeiture,² while an entire cessation of all public use is such a cause.³ The land-owner may, in case of misappropriation, maintain his right by a writ of entry.⁴ A writ of mandamus has been held a proper remedy to compel the corporation to work its railway.⁵ The right to complain of a discontinuance of trains, or of a change in the management of the road, is a public right to be asserted by the State, and not a private right to be asserted by individuals, who suffer only as a part of the public.⁶ A company may lose its right to its location by permitting another company to take the land included within it, and to build a road upon it.⁷

The company having no power to grant an easement within its location for travel, such an easement cannot be acquired by prescription;⁸ and a parol license to pass over or otherwise use the location is revocable.⁹ But it may, it has been held, allow the adjoining owner to obtain title by adverse possession, where by its conduct it shows its purpose to abandon to him its location, or a part thereof.¹⁰

The land included in a location reverts, on its ceasing to be held for a public use, to the original owner.¹¹ But a transfer of

¹ *Barlow v. Chicago, R. I., & P. R. Co.*, 29 Iowa, 276; *Noll v. Dubuque, B., & M. R. Co.*, 32 Iowa, 66; *Hestonville, M., & F. Pass. R. Co. v. Philadelphia*, 89 Pa. St. 210.

² *Commonwealth v. Fitchburg R. Co.*, 12 Gray, 180.

³ *People v. Albany & V. R. Co.*, 24 N. Y. 261, 37 Barb. 216, 19 How. Pr. 523; *People v. Kingston & M. Turnp. R. Co.*, 23 Wend. 193; *People v. Bristol & R. Turnp. Co.*, 23 Wend. 223; *Attorney-General v. West Wisconsin R. Co.*, 36 Wis. 466; *Kenton County v. Bank Lick Turnp. Co.*, 10 Bush, 529.

⁴ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1.

⁵ *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *People v. Albany & V. R. Co.*, 24 N. Y. 261, 268, 37 Barb. 216, 19 How. Pr. 323; *Attorney-General v. Boston*, 123 Mass. 460, 475; *Attorney-General v. Birmingham & O. J. R. Co.*, 4 De Gex & S. 490; *King v. Severn & W. R. Co.*, 2 B. &

Ald. 646; *Regina v. Birmingham & G. R. Co.*, 2 Q. B. N. s. 47; *Regina v. London & N. W. R. Co.*, 16 Q. B. N. s. 864.

⁶ *Kinealy v. St. Louis, K., C., & N. R. Co.*, 69 Mo. 658. But see *Baltimore & S. R. Co. v. Compton*, 2 Gill, 20. Compare *Knorr v. Germantown R. Co.*, 5 Whart. 256.

⁷ *Coe v. New Jersey Midland R. Co.*, 4 Stewart (N. J.), 105, 146; *Chesapeake & O. Canal Co. v. Balt. & O. R. Co.*, 4 Gill & J. 1.

⁸ *Sapp v. Northern Cent. R. Co.* (Md. C. & App., October, 1878), 8 Reporter, 334, 51 Md. 115.

⁹ *Penn. R. Co. v. Jones*, 50 Pa. St. 417; *Heyl v. Phil., W., & B. R. Co.*, 51 Pa. St. 469; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; *ante*, Chap. VI. p. 131.

¹⁰ *Norton v. London & N. W. R. Co.*, L. R. 9 Ch. Div. 623, L. R. 13 Ch. Div. 268.

¹¹ *Jessup v. Loucks*, 55 Pa. St. 350.

the location, under authority of law, to another corporation, to be used for the same or similar purpose, does not have this effect.¹

Title to Location, how questioned. — The record of a court of competent jurisdiction authorizing the condemnation cannot be impeached collaterally.² But the land-owner may dispute a location which is void under the statute.³ Acts done under color of the charter can be questioned only by the State.⁴ The owner of land, at the time of the taking, can alone question the validity of the location;⁵ and he can question only the location upon his own land.⁶ He cannot interfere to prevent the construction of the railroad on a location lawfully acquired, where the company proceeds to complete the construction after the period fixed by statute for its completion.⁷

Illegal Location confirmed. — The legislature may confirm an illegal location, but the confirming statute will not be presumed to relieve the company from liabilities to individuals, or to the public, which existed at the time of the confirmation.⁸

Bill in Equity to reform a Defective Location. — Equity will not reform a location on a bill brought by a land-owner on the ground that the company's agent, without its authority or knowledge, agreed with him by parol that the location should be of a certain width, which was less than that of the location as filed.⁹

Trespassers upon a Location, liable to an Action at Common Law. — The company may maintain actions of tort for unlawful entries upon its location.¹⁰

¹ Junction R. Co. v. Ruggles, 7 Ohio St. 1; Hatch v. Cincinnati & I. R. Co., 18 Ohio St. 92; ante, Chap. VIII. p. 233.

² Galena & C. U. R. Co. v. Pound, 22 Ill. 399; Western Md. R. Co. v. Patterson, 37 Md. 125; New Central Coal Co. v. George's Creek Coal & I. Co., 37 Md. 537; Cleveland, P., & A. R. Co. v. Erie, 27 Pa. St. 380; Cleveland & P. R. Co. v. Speer, 56 Pa. St. 325.

³ New York, H., & N. R. Co. v. Boston, H., & E. R. Co., 36 Conn. 196.

⁴ Farnham v. Delaware & H. C. Co., 61 Pa. St. 265.

⁵ Hentz v. Long Island R. Co., 13 Barb. 646.

⁶ Newton v. Agricultural Branch R. Co., 15 Gray, 27.

⁷ Atlantic & P. R. Co. v. St. Louis, 66 Mo. 228, 3 Mo. App. 315.

⁸ Commonwealth v. Old Colony & F. R. R. Co., 14 Gray, 93; Salem v. Eastern R. Co., 98 Mass. 431.

⁹ Central Mills Co. v. New York & N. E. R. Co., 127 Mass. 537.

¹⁰ Conn. & P. R. R. Co. v. Holton, 32 Vt. 43; Troy & B. R. Co. v. Potter, 42 Vt. 265; Bangor, O., & M. R. Co. v. Smith, 47 Me. 34, 49 Me. 9; Morrison v. Bucksport & B. R. Co., 67 Me. 353; Greenville & C. R. Co. v. Partlow, 14 Rich. 237.

CHAPTER X.

LIABILITY FOR TORTS IN GENERAL.

Injuries to Real Estate. — The liability of a railroad company for torts or actionable injuries to real estate is substantially the same as that of individuals, and it is not limited to the legal capacity of the corporation.¹ It is in general determined by the principle *sic utere tuo ut alienam non lædas*, as applied to the relations of individuals; but under statutes the citizen may have larger rights against the company than at common law.² Whether the landowner's redress is by action at law will depend on the scope and limits of the special remedy usually provided by statute for injuries to private property, which are authorized by the State in the exercise of its right of eminent domain.

Statute Remedies exclusive. — Usually, where the legislature authorizes the taking of private property for a public use, it provides, as already stated, a special remedy for determining his compensation; and this remedy excludes actions at common law for all acts and proceedings which are within the statute and its remedy.³ The special remedy, however, does not exclude actions at common law for injuries which were not authorized by statute, or for those which result from the negligent and unskilful use of powers conferred by the statute.⁴ The special remedy is more comprehensive in some States than in others, and, therefore, an interference with private rights which comes within it in one

¹ *National Bank v. Graham*, 100 U. S. 699, 702, Swayne, J.: "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application." See *Doolan v. Midland R. Co.*, L. R. 2 App. Cas. 792.

² *Phil. & R. R. Co. v. Yeiser*, 8 Pa. St. 366; *Pittsburg, Ft. W., & C. R. Co. v. Gilleland*, 56 Pa. St. 445; *Burroughs v. Housatonic R. Co.*, 15 Conn. 124; *Hooker v. New Haven & N. Co.*, 15 Conn. 312,

321; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504; *Thompson v. Androscoggin R. I. Co.*, 54 N. H. 545, 58 N. H. 108; *Wabash & E. Canal v. Spears*, 16 Ind. 441; *Morrison v. Bucksport & B. R. Co.*, 67 Me. 353; *Hurdman v. North Eastern R. Co.*, L. R. 3 C. P. Div. 168.

³ *Ante*, Chap. VII, EMINENT DOMAIN, p. 177.

⁴ *Ante*, Chap. VII, EMINENT DOMAIN, p. 179.

State will in another be a cause of action at common law.¹ Thus, actions at law have been maintained against the railroad company, where, under due authority of law and in the prudent construction of its works, it diverted streams of water from their natural course, depriving the land-owner of his right to the reasonable use of the water;² turned water upon land of persons not crossed by the railroad;³ disturbed the natural support of the adjoining proprietor's soil;⁴ threw stones in blasting on land outside of its location;⁵ changed the grade of a street, and laid tracks on it to the injury of the owner of land lying on it;⁶ and constructed its road upon a turnpike to the injury of the company owning it.⁷ Some, if not all, of these injuries, when resulting from the lawful and proper construction of the railroad, are in other States held to be included within the special remedy.⁸ The points here noted have been already considered in an earlier chapter, where the authorities are cited and illustrations given.⁹

Consequential Injuries not actionable.—The company, like any other proprietor, is not liable at common law for injuries resulting to others from the use of its location, where it conducts its business with proper care and skill, and does not exceed its powers. It is entitled to do within its location the things necessary and usual in the construction, maintenance, and working of its railroad, and is not responsible, except under statutes, for damage suffered in the reasonable exercise of this right.¹⁰ Thus,

¹ *Ante*, Chap. VII., EMINENT DOMAIN, p. 176.

² *Stodghill v. Chicago, B., & Q. R. Co.*, 43 Iowa, 26; *Robinson v. New York & E. R. Co.*, 27 Barb. 512.

³ *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504; *Robinson v. New York & E. R. Co.*, 27 Barb. 512.

⁴ *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Richardson v. Vt. Cent. R. Co.*, 25 Vt. 465; *Hatch v. Vt. Cent. R. Co.*, 25 Vt. 49, 63; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504, 521, 528, 529; *People v. Canal Board*, 2 Thomp. & C. 275. But see *Boothby v. Androscoggin & K. R. Co.*, 51 Me. 318; *Hortsmann v. Covington & L. R. Co.*, 18 B. Monr. 218. The company is liable for injuries arising from such excavation when not conducted with proper precautions. *Rau v. Minn. Valley R. Co.*, 13 Minn. 442; *Cahill v. Eastman*, 18 Minn. 324.

⁵ *Carman v. Steubenville & I. R. Co.*, 4 Ohio St. 399; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 N. Y. 163. For liability for a personal injury by negligence in blasting, see *Driscoll v. Newark & R. L. & C. Co.*, 37 N. Y. 637.

⁶ *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467.

⁷ *Seneca Road Co. v. Auburn & R. R. Co.*, 5 Hill, 170.

⁸ *Dodge v. County Com'rs*, 3 Met. 380; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Curtis v. Eastern R. Co.*, 14 Allen, 55, 98 Mass. 428; *Boothby v. Androscoggin & K. R. Co.*, 51 Me. 318; *Whitehouse v. Androscoggin & K. R. Co.*, 52 Me. 208; *Sabin v. Vt. Cent. R. Co.*, 25 Vt. 363.

⁹ *Ante*, Chap. VII., pp. 174-177.

¹⁰ See authorities cited *ante*, Chap. VII. pp. 197, 198.

when using due care and skill in the construction and operation of its road and machinery, it is not liable at common law for fires communicated to property by sparks issuing from its engines;¹ for injuries caused by the explosion of its steam-boilers;² for injuries to cattle frightened by the headlights or noise of its engines;³ for inconveniences like noise, smoke, sparks, stench, or jarring caused by its trains;⁴ or for the accumulation of snow on the adjoining owner's land caused by structures erected within the location to prevent the tracks being obstructed by snow.⁵

Injuries caused by the Lawful Use of the Location not actionable.—The company's right to its location, except at the crossings of ways established by law, is practically exclusive, and it may within it do all acts necessary and proper for the construction and operation of its road. The company is presumed to have paid compensation to the land-owner in the mode prescribed by statute for all injuries necessarily resulting from the proper execution of the authority conferred upon it. Accordingly, it is not liable for injuries to adjoining owners arising from the lawful use of its location.⁶ Its right to its location is, however, limited to the uses for which the property was taken, and is not equal to that of an ordinary proprietor, who may use his land for all lawful purposes.⁷

The Company's Right to its Location Subject to Public Exigencies.—The company's right to the exclusive possession of its

¹ Phil. & R. R. Co. v. Yeiser, 8 Pa. St. 366; Sunbury & E. R. Co. v. Hummell, 27 Pa. St. 99; Burroughs v. Housatonic R. Co., 15 Conn. 124; Thompson v. Androscoggin R. I. Co., 54 N. H. 545, 556, 58 N. H. 108. The company's liability for injuries by fire, at common law and under statutes, will be treated in Chap. XVI.

² Losee v. Buchanan, 51 N. Y. 476.

³ Bellefontaine & I. R. Co. v. Schruy-hart, 10 Ohio St. 116; Hahn v. Southern Pacific R. Co., 51 Cal. 605.

⁴ Randle v. Pacific R. Co., 65 Mo. 325; Hentz v. Long Island R. Co., 13 Barb. 646; Cleveland & P. R. Co. v. Speer, 56 Pa. St. 325; Burton v. Phil., W., & B. R. Co., 4 Harring. (Del.) 252; Illinois Cent. R. Co. v. Grabill, 50 Ill. 241; Eames v. New England Worsted Co., 11 Met. 570; Presbrey v. Old Colony & N. R. Co., 103

Mass. 1; Walker v. Old Colony & N. R. Co., 103 Mass. 10. See two early conflicting cases in New York, in both of which there was the same plaintiff, being actions for running trains illegally on Sunday during public worship in the vicinity of and to the annoyance of a religious society. First Baptist Church v. Schenectady & T. R. Co., 5 Barb. 79; First Baptist Church v. Utica & S. R. Co., 6 Barb. 313. Compare Hatch v. Vt. Cent. R. Co., 25 Vt. 49, 62; State v. Tupper, Dudley (S. C.), 135; ante, Chap. VII. pp. 197, 198, 208, 217.

⁵ Carson v. Western R. Co., 8 Gray, 423; Eaton v. Boston, C., & M. R. Co., 51 N. H. 504, 527.

⁶ Chap. VII., EMINENT DOMAIN, pp. 159-161, 197.

⁷ Chap. VII., EMINENT DOMAIN, p. 160.

right of way must yield at times to superior public exigencies. The proper public authorities, acting upon the maxim, *salus populi suprema est lex*,¹ may, in order to extinguish a fire, lay a hose across the track; and the company is liable to the town or city which owns the engine, when, after due warning or notice, it wilfully or negligently severs the hose by running the train over it.² It is likewise liable, when thus in default, for the burning of a building which but for its unlawful act would have been saved; and its wrong is deemed the proximate cause of the injury.³ The proper public officers may enter on the track to build or repair public highways and bridges which are lawfully laid across it.⁴

Grants and Licenses.—A grant or license, or request from the land-owner, will justify the company's interference with his property which would otherwise be a trespass. The grant of land for the purposes of the railroad, or of authority to build and maintain it, implies a license to do all acts necessary and proper for the construction and maintenance of the railroad, and such grant is a defence to actions of tort for acts coming within it.⁵ A grant or license, while justifying acts within it, will not relieve the company from liability to an action for the consequences of its want of care and skill in constructing and managing the authorized works.⁶

Injuries from the Choice of or Changes in the Location.—Where the company has a discretion in the choice of a location, it is not liable to an action for selecting one rather than another, on the ground that another would have been less injurious to the land-owner.⁷ A land-owner who suffers injury which is common to

¹ Taylor v. Plymouth, 8 Met. 462, 466.

² Hyde Park v. Gay, 120 Mass. 589.

³ Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277; Atkinson v. Newcastle & G. W. Co., L. R. 6 Exch. 404. But see Mott v. Hudson River R. Co., 1 Robertson, 585, 8 Bosw. 345.

⁴ Sweeney v. Boston & A. R. Co., 128 Mass. 5; North Penn. R. Co. v. Stone, 3 Phil. 421.

⁵ Babcock v. Western R. Co., 9 Met. 553; Boothby v. Androscoggin & K. R. Co., 51 Me. 318; Hortsman v. Lexing-

ton & C. R. Co., 18 B. Monr. 219; Hills v. Boston & M. R., 18 N. H. 179; Ludlow v. Hudson River R. Co., 4 Hun, 239; Clark v. Vt. & C. R. Co., 28 Vt. 103; Mathews v. St. Paul & S. C. R. Co., 18 Minn. 434; Illinois Cent. R. Co. v. Allen, 39 Ill. 205; ante, Chap. VI. pp. 132-134.

⁶ Selden v. Delaware & H. Canal Co. 29 N. Y. 634, 24 Barb. 362; Hatch v. Vt. Cent. R. Co., 25 Vt. 49, 69, 70; Spencer v. Hartford, P., & F. R. Co., 10 R. I. 14; ante, Chap. VI. p. 134; Chap. VII. p. 180.

⁷ New York & E. R. Co. v. Young, 33 Pa. St. 175.

other citizens in the vicinity in the depreciation of his property, by the removal of the company's location to some point more remote from his property, has no right of action against the company.¹ A deviation from the lawful location at one point cannot be taken advantage of by a person who owns land at another point, which is included within it.² The company is liable for an entry to make a new location after its power has been exhausted.³

Actions for Trespasses and Abuse of Powers.—The statute remedy does not exclude actions at common law for injuries which the special tribunal had no right to take into account. In an assessment it is presumed that the company will execute its authority in a lawful and proper manner. Therefore, where it transcends or abuses its powers to a person's injury, he has his remedy at common law.⁴

The company is liable to an action at common law for a trespass which preceded an entry or occupation under due and legal proceedings.⁵ It is liable to an action where it constructs its road outside of its location;⁶ or without authority appropriates materials outside of it;⁷ or enters on the adjoining land to construct a drain;⁸ or to use such land as a cart-way or for other purposes;⁹ or unlawfully obstructs an easement, as a right of drainage, passage, or access.¹⁰

It is liable to an action for injuries caused by the negligent and unskilful construction of its road.¹¹ Thus, while necessary injuries caused to land-owners in the blasting of rocks within the location may be within the special remedy, it is liable to an action if it fails, within a reasonable time, to remove them from the adjoining land on which they were thrown.¹² It is liable for the

¹ *Kinealy v. St. Louis, K. C., & N. R. Co.*, 69 Mo. 658. But see *Baltimore & S. R. Co. v. Compton*, 2 Gill, 20.

² *Newton v. Agricultural Branch R. Co.*, 15 Gray, 27.

³ *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235; *ante*, Chap. IX. pp. 254, 255.

⁴ *Ante*, Chap. VII., EMINENT DOMAIN, p. 179.

⁵ *Ante*, Chap. VII., EMINENT DOMAIN, p. 179.

⁶ *Hazen v. Boston & M. R.*, 2 Gray, 574; *Eaton v. European & N. A. R. Co.*, 59 Me. 520, 537.

⁷ *Parsons v. Howe*, 41 Me. 218.

⁸ *State v. Armell*, 8 Kan. 288.

⁹ *Sabin v. Vt. Cent. R. Co.*, 25 Vt. 363.

¹⁰ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385; *Bell v. Midland R. Co.*, 10 C. B. N. S. 287.

¹¹ Chap. VII., EMINENT DOMAIN, p. 179.

¹² *Sabin v. Vt. Cent. R. Co.*, 25 Vt. 363; *Whitehouse v. Androscoggin R. Co.*, 52 Me. 208; *ante*, Chap. VII., EMINENT DOMAIN, p. 175.

unauthorized diversion of streams from their natural course, and for not maintaining adequate culverts and openings for their passage, whereby land-owners suffer injury.¹ Various interferences with waters and highways, entitling persons to compensation, either by a special remedy or by an action at law, have been treated in two preceding chapters.²

A company entering on private property for the construction of its road, without taking the steps and complying with the conditions prescribed by the Constitution and statutes, is a trespasser, and liable to an action at law. This point has been already considered.³

The company is liable for injuries resulting from its unlawful acts. Thus, it is liable for fire communicated from its engines, even in the absence of negligence, where it has not the right to use locomotive engines propelled by steam.⁴

Penal Actions. — Penal actions against railroad corporations for the enforcement of police regulations, or for compelling the performance of certain duties, either at the suit of parties interested or of common informers, are sometimes authorized by statutes.⁵ They may be prosecuted for the illegal acts of the company's servants, done with its express or implied authority.⁶ A party availing himself of this remedy must bring himself strictly within it.⁷ The legislature may remit a penalty which is recoverable by a municipal corporation.⁸ Police regulations are also enforced by information.⁹

Liable to Indictment. Nuisances. Breach of Duty. — A corporation may be prosecuted by indictment for a nuisance, consisting in a misfeasance as well as for one consisting in a non-feasance.¹⁰

¹ *Ante*, Ch. VII., EMINENT DOMAIN, p. 203.

² Chap. VII., EMINENT DOMAIN, pp. 203-206; Chap. VIII., RAILROADS UPON HIGHWAYS.

³ *Ante*, Chap. VII., EMINENT DOMAIN, p. 170.

⁴ *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733.

⁵ *Galena & U. R. Co. v. Appleby*, 28 Ill. 283; *Commonwealth v. Ohio & P. R. Co.*, 1 Grant, 329; *Barrett v. Malden & M. R. Co.*, 3 Allen, 101.

⁶ *Commonwealth v. Ohio & P. R. Co.*, 1 Grant, 329.

⁷ *Keith v. Cheshire R. Co.*, 1 Gray, 614.

⁸ *State v. Balt. & O. R. Co.*, 3 How. 534, 12 Gill & J. 399.

⁹ *State v. Vt. Cent. R. Co.*, 28 Vt. 583.

¹⁰ *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *State v. Vt. Cent. R. Co.*, 27 Vt. 103; *Donaldson v. Miss. & M. R. Co.*, 18 Iowa, 280; *Regina v. Great North of England R. Co.*, 9 Q. B. 315.

Generally it is not indictable for misfeasances, unless they are of the nature of nuisances.¹ It is liable under statutes to indictment for breach of public duty, where it would not be liable at common law, as for fatal injuries caused by its negligence.² It may be indicted for the violation of Sunday laws.³ The indictable act may be done by agents or servants acting with its express or implied authority.⁴ The company may, at common law or under statutes, be liable for nuisances injurious to the public health.⁵

A summons may be issued to the corporation upon the indictment, and judgment entered on its default.⁶

Acts authorized by Law not Subject to Indictment.—Acts and proceedings of the company within the authority of statutes are not indictable. It would be absurd for the State to punish an act which it had directed or sanctioned.⁷ The authority, however, will not in all cases relieve the company from liability for injuries to individuals, and it will not be presumed to have that effect.⁸ It will not be a defence against actions for damages where it interferes with the constitutional right to compensation for property taken; ⁹ but it will be a defence against actions for

Contra, *State v. Great Works Milling Man. Co.*, 20 Me. 41; *State v. Ohio & M. R. Co.*, 23 Ind. 362.

¹ *Delaware Div. Canal Co. v. Commonwealth*, 60 Pa. St. 367; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339.

² *Carey v. Berkshire R. Co.*, 1 Cush. 475; *Boston, C., & M. R. Co. v. State*, 32 N. H. 215.

³ *State v. Balt. & O. R. Co.*, 15 W. Va. 362.

⁴ *Boston, C., & M. R. Co. v. State*, 32 N. H. 215; *State v. Vt. Cent. R. Co.*, 27 Vt. 103.

⁵ *Delaware Div. Canal Co. v. Commonwealth*, 60 Pa. St. 367; *Salem v. Eastern R. Co.*, 98 Mass. 431.

⁶ *Boston, C., & M. R. Co. v. State*, 32 N. H. 215.

⁷ *Rex v. Pease*, 4 B. & Ad. 30; *Matson v. Baird*, L. R. 3 App. Cas. 1082, 1088; *Bordentown & S. A. T. R. v. Camden & A. R. & T. Co.*, 2 Harrison, 314; *Hinchman v. Paterson Horse R. Co.*, 2 C. E. Green, 75; *Attorney-General v. New York & L. B. R. Co.*, 9 C. E. Green, 49, 55; *Hodgkin-*

son v. Long Island R. Co., 4 Edw. Ch. 411; *Baxter v. Spuyten Duyvil & P. M. R. Co.*, 61 Barb. 428; *Danville, H., & W. R. Co. v. Commonwealth*, 73 Pa. St. 29; *Thompson v. Androscoggin R. I. Co.*, 54 N. H. 545, 555, 58 N. H. 108; *People v. Detroit & H. Plank Road Co.*, 37 Mich. 195; *Randle v. Pacific R. Co.*, 65 Mo. 325.

⁸ *Tinsman v. Belvidere Del. R. Co.*, 2 Dutch. 148; *Hooksett v. Amoskeag Man. Co.*, 44 N. H. 105, 110; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504, 510; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, 133.

⁹ *Crittenden v. Wilson*, 5 Cowen, 165; *Robinson v. New York & E. R. Co.*, 27 Barb. 512, 520; *Sinnickson v. Johnson*, 2 Harrison, 129; *Ten Eyck v. Del. & R. Canal*, 3 Harrison, 200; *Tinsman v. Belvidere Del. R. Co.*, 2 Dutcher, 148, 174, 1 Dutcher, 255; *Eastman v. Amoskeag Man. Co.*, 44 N. H. 143, 160; *Eaton v. Boston, C., & M. R. Co.*, 51 N. H. 504, 510; *Thompson v. Androscoggin R. I. Co.*, 54 N. H. 545, 58 N. H. 108; *ante*, Chap. VII. p. 167.

injuries not deemed a taking of property within the meaning of the Constitution, which but for such authority would be actionable.¹ The confirmation, by statute, of an illegal location is no ground for arresting judgment on an indictment for a nuisance on which the company had been convicted before the passage of the statute.²

Equitable Remedies against Nuisances. — Equity will enjoin the company from maintaining a public nuisance at the instance of the proper public officer acting on behalf of the State, or on the relation of private parties having an interest;³ and also at the suit of private parties suffering injury peculiar in kind and degree as distinguished from that suffered by the public generally.⁴ The remedy is available to cities and towns in the case of unlawful interferences with the highway.⁵ To obtain the equitable remedy, these conditions should concur: 1. A right clearly established.⁶ 2. No other adequate remedy available.⁷ 3. An application for the remedy, even when on behalf of the State, made without unreasonable delay.⁸ If the nuisance is indictable,

¹ *Hatch v. Vt. Cent. R. Co.*, 25 Vt. 49, 61; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 70; *Caledonian R. Co. v. Ogilvy*, 2 Macq. 229; *Pittsburg, C., & St. L. R. Co. v. Brown*, 67 Ind. 45.

² *Commonwealth v. Old Colony & F. R. R. Co.*, 14 Gray, 93.

³ *People v. Sturtevant*, 9 N. Y. 263; *Davis v. New York*, 14 N. Y. 506, 526; *Wetmore v. Story*, 22 Barb. 414; *District Attorney v. Lynn & B. R. Co.*, 16 Gray, 242; *Haskell v. New Bedford*, 108 Mass. 208, 216; *Delaware & R. C. Co. v. Raritan & D. B. R. Co.*, 1 C. E. Green, 321, 381; *ante*, Chap. VIII. p. 251, Chap. VII. p. 168.

⁴ *Hinchman v. Paterson Horse R. Co.*, 2 C. E. Green, 75; *Brainard v. Conn. River R. Co.*, 7 Cush. 506; *Hartshorn v. South Reading*, 3 Allen, 501; *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen, 221; *Cadigan v. Brown*, 120 Mass. 493; *Hudson & D. C. Co. v. New York & E. R. Co.*, 9 Paige, 323; *Davis v. New York*, 14 N. Y. 506, 526; *Milbau v. Sharp*, 27 N. Y. 611; *Osborne v. Brooklyn City R. Co.*, 5 Blatch. 366; *Currier v. West Side Elevated R. Co.*, 6 Blatch. 487; *Miller v. Long Island R. Co.*

(U. S. C. C., E. D. N. Y.), 10 Reporter, 197; *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401.

⁵ *Johnston v. Providence & S. R. Co.*, 10 R. I. 365.

⁶ *Mohawk Bridge v. Utica & S. R. Co.*, 6 Paige, 554; *Sheboygan v. Sheboygan & F. R. Co.*, 21 Wis. 667, 671; *District Attorney v. Lynn & B. R. Co.*, 16 Gray, 242; *Haskell v. New Bedford*, 108 Mass. 208, 216; *Bell v. Ohio & P. R. Co.*, 25 Pa. St. 161; *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401; *Northern Pacific R. Co. v. Barnesville & M. R. Co.*, 4 Fed. Rep. 172.

⁷ *Attorney-General v. New Jersey R. & T. Co.*, 2 Green Ch. 136; *Hinchman v. Paterson Horse R. Co.*, 2 C. E. Green, 75; *Morris & E. R. Co. v. Prudden*, 5 C. E. Green, 530; *Stevens v. Erie R. Co.*, 6 C. E. Green, 259; *Carlisle v. Cooper*, 6 C. E. Green, 576; *Morris Canal & B. Co. v. Fagin*, 7 C. E. Green, 430; *Hudson & D. C. Co. v. New York & E. R. Co.*, 9 Paige, 323; *Hodgkinson v. Long Island R. Co.*, 4 Edwards Ch. 411.

⁸ *Attorney-General v. New York & L. B. R. Co.*, 9 C. E. Green, 49; *Hentz v. Long Island R. Co.*, 13 Barb. 646. Equity will not interfere to require what will not

an injunction will be granted only in a case of peculiar emergency.¹

An injunction has been granted to restrain one railroad company from obstructing the access to the station of another company by means of a fence erected partly on a public way and partly on the latter company's land.²

Action for a Nuisance. — An individual has a private right of action for an injury caused by a public nuisance which has been created by the company, as by the unlawful use of highways and navigable waters, only when special damage to him combines with the breach of public duty by the company. If the wrong suffered by him is only the same as that suffered by the public at large, he has no personal right of action; and this rule applies, although from the circumstances in which he happens to be placed he may suffer more frequently and more severely than others. It is only when he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him. This rule applies equally where equitable relief or legal remedies are sought by a party.³ An individual having a private right of action for a nuisance may enter to abate it.⁴

Continuance of the Nuisance. Notice. — The company is not liable in damages for the continuance of a nuisance erected by a previous owner, or by a company to whose road it has succeeded

serve any useful purpose of the plaintiff, and will at the same time be injurious to the defendant. *Joliet & C. R. Co. v. Healey*, 94 Ill. 416.

¹ See cases cited *ante*, note 7, p. 269.

² *London & N. W. R. Co. v. Lancashire & Y. R. Co.*, L. R. 4 Eq. Cas. 174.

³ *Brainard v. Conn. River R. Co.*, 7 Cush. 506; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 10 Cush. 385, 388; *Blood v. Nashua & L. R. Co.*, 2 Gray, 137, 140; *Harvard College v. Stearns*, 15 Gray, 1; *Willard v. Cambridge*, 3 Allen, 574; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen, 221, 224; *Ilaskell v. New Bedford*, 108 Mass. 208; *Lamphier v. Worcester & N. R. Co.*, 33 N. H. 495; *Eaton v. Boston & M. R.*, 51 N. H. 504, 523, 524; *Hatch*

v. Vt. Cent. R. Co., 28 Vt. 142, 147, 25 Vt. 49; *Buck v. Conn. & P. R. R. Co.*, 42 Vt. 370; *Hughes v. Providence & W. R. Co.*, 2 R. I. 493; *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235; *Parrot v. Cincinnati, H., & D. R. Co.*, 3 Ohio St. 330; *Penn. & O. C. Co. v. Graham*, 63 Pa. St. 290; *South Carolina R. Co. v. Moore*, 28 Ga. 398; *Chicago, R. I., & P. R. Co. v. Moffitt*, 75 Ill. 524; *Wabash & E. Canal v. Spears*, 16 Ind. 441; *Houck v. Wachter*, 34 Md. 265; *Milhau v. Sharp*, 27 N. Y. 611; *Kellinger v. Forty-Second St. R. Co.*, 50 N. Y. 206; *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401; *Manley v. St. Helen's C. & R. Co.*, 2 Hurl. & N. 840; *ante*, Chap. VII. p. 201, Chap. VIII. p. 250.

⁴ *Amoskeag Man. Co. v. Goodale*, 46 N. H. 53.

by purchase, without proof of notice, or at least knowledge, of the nuisance.¹ Some authorities hold a request to abate as also essential where the proceeding is against a company succeeding to the road of another which created the nuisance, on the ground that acquiescence is to be assumed in case the request is not made;² but the authorities are not uniform to this effect.³ The company complained of may be so identified by consolidation or otherwise with the one which created the nuisance as to make further notice or request unnecessary.⁴ The person who erected the nuisance is not entitled to notice.⁵

The corporation may be required to abate a nuisance, although created by it on the land of another.⁶ It is not liable as for a nuisance where structures within the exclusive control of another corporation are placed, under authority of law, within its location.⁷

Lapse of Time as affecting a Nuisance. — The right to maintain a nuisance cannot be obtained by lapse of time, at least for a period less than the Statute of Limitations.⁸

Navigable Waters and Highways. — The liability of the company to indictment or an action for the obstruction of navigable waters⁹ and highways,¹⁰ has been already treated.

Right of Action in the Person who was the Owner at the Time of the Injury. — The right of action for a tort to real estate belongs

¹ *Conhocton Stone Road v. Buffalo, N. Y., & E. R. Co.*, 51 N. Y. 573, 5 Thomp. & C. 651, 52 Barb. 390, 3 Hun, 523. See *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 486.

² *West v. Louisville, C., & L. R. Co.*, 8 Bush, 404; *McDonough v. Gilman*, 3 Allen, 264; *Nichols v. Boston*, 98 Mass. 39, 43.

³ *Morris Canal & B. Co. v. Ryerson*, 3 Dutcher, 457; *Conhocton Stone Road v. Buffalo, N. Y., & E. R. Co.*, 51 N. Y. 573; *Dickson v. Chicago, R. I., & P. R. Co.* (Mo. S. C.), 10 Reporter, 247.

⁴ *Chicago, R. I., & P. R. Co. v. Moffitt*, 75 Ill. 524.

⁵ *Missouri River Packet Co. v. Hannibal & St. J. R. Co.* (U. S. C. C., W. D. Mo., May, 1880), 2 Fed. Rep. 285.

⁶ *Delaware Div. Canal Co. v. Commonwealth*, 60 Pa. St. 367.

⁷ *Gwathney v. Little Miami R. Co.*, 12 Ohio St. 92.

⁸ *Cotton v. Pocasset Man. Co.*, 13 Met. 429; *Haskell v. New Bedford*, 108 Mass. 208; *Attorney-General v. Leeds*, L. R. 5 Ch. App. 583; *West v. Louisville, C., & L. R. Co.*, 8 Bush, 404; *Young v. Chicago & N. W. R. Co.*, 28 Wis. 171; *Morris & E. R. Co. v. Prudden*, 5 C. E. Green, 530; *Carlisle v. Cooper*, 6 C. E. Green, 576, 591; *Pettis v. Johnson*, 56 Ind. 139; *ante*, Chap. VIII. p. 244. See *Attorney-General v. New York & L. B. R. Co.*, 9 C. E. Green, 49.

⁹ *Ante*, Chap. VII., EMINENT DOMAIN, p. 201.

¹⁰ *Ante*, Chap. VIII., RAILROADS ON HIGHWAYS, pp. 243, 250, 251.

to the person owning it at the time the injury was committed, and does not pass to a purchaser;¹ but a vendee in possession under a contract of sale may maintain the action.²

Reversioners. Parties in Possession. — Reversioners may maintain an action for injuries to real estate which are permanent in their nature.³ The party in possession has a right of action for an injury to the possession.⁴ The wife, having a sole and separate estate of her own, can alone maintain an action for an injury to the reversion; but the husband may join with her in an action for an injury to the possession.⁵

Proof of Title. — Possession of real estate under a claim of title is sufficient *prima facie* evidence of title to sustain an action of trespass.⁶

Form of Action. — The company is liable to an action of trespass *quare clausum*, and to an action on the case for injuries to real estate, which are committed without legal authority.⁷

Damages to Real Estate. Permanent Injuries. — The measure of damages for an injury of a permanent character, as by the flooding of land caused by permanent structures, and the effect of a judgment in one action as a bar to actions for subsequent injuries, have already been considered.⁸

Duty of the Owner to endeavor to save his Property. — A person whose property has been injured by the negligence of the com-

¹ Illinois Cent. R. Co. v. Allen, 39 Ill. 205; Central R. Co. v. Hetfield, 5 Dutcher, 206; Harrington v. St. Paul & S. C. R. Co., 17 Minn. 215. The right to compensation for a taking of the land under the right of eminent domain belongs also to the person who was the owner at the time of the taking. *Ante*, Chap. VII. p. 185.

² Hays v. Miller, 6 Hun, 320; Miller v. Long Island R. Co., 9 Hun, 194; Rood v. New York & E. R. Co., 18 Barb. 80.

³ Bell v. Midland R. Co., 10 C. B. N. S. 287; Mumford v. Oxford, W. & W. R. Co., 1 Hurl. & N. 34; Indianapolis, B., & W. R. Co. v. McLaughlin, 77 Ill. 275; Bannon v. Mitchell, 6 Brad. (Ill.) 17.

⁴ Halligan v. Chicago & R. I. R. Co.,

15 Ill. 558; Cain v. Chicago, R. I., & P. R. Co., 21 Albany L. J. 95.

⁵ Illinois Cent. R. Co. v. Grable, 46 Ill. 445; Indianapolis, B., & W. R. Co. v. McLaughlin, 77 Ill. 275.

⁶ Carl v. Sheboygan & F. R. Co., 46 Wis. 625.

⁷ Bloodgood v. Mohawk & H. R. Co., 18 Wend. 9; Dater v. Troy Turnp. Co., 2 Hill, 629; New York v. Bailey, 2 Denio, 433, 439; Whiteman v. Wilmington & S. R. Co., 2 Harring. 514; Crawfordsville & W. R. Co. v. Wright, 5 Ind. 252; Main v. North Eastern R. Co., 12 Rich. 82; *ante*, Chap. VII. pp. 167, 179.

⁸ *Ante*, Chap. VII., EMINENT DOMAIN, pp. 229-231.

pany should make reasonable efforts to prevent an increase of the injury, and, if he fails to do so, he cannot recover for such increased injury.¹ Nor can he recover where he voluntarily exposes his property to injury.²

Actions for Various Torts.—The company is liable to actions for false imprisonment,³ malicious prosecution,⁴ and libel, with the same protection for privileged communications and the same liability for abusing the privilege as in the case of individuals.⁵ A railroad company is liable to an action at law and subject to equitable remedies for the infraction of patent-rights in the same manner as an individual.⁶ The company's liability for over-issues of stock,⁷ and the liability of the directors for false representations as to its value,⁸ have already been considered.

Injuries from Explosive Substances.—The company is liable for injuries to persons and property resulting from explosive substances which it is transporting as a common carrier only when it is chargeable with negligence; and it is not presumed to have notice of the dangerous character of the packages in its custody.⁹ It may, when it receives for transportation packages containing such substances, without being informed by their appearance or otherwise of the contents, recover of the persons who, knowing their contents, delivered the packages without giving notice of their character, the damages resulting from the ex-

¹ *Loker v. Damon*, 17 Pick. 284; *Chase v. New York Cent. R. Co.*, 24 Barb. 273; *Lawson v. Price*, 45 Md. 123; *Kansas Pacific R. Co. v. Muhlman*, 17 Kan. 224.

² *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339.

³ *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *Roe v. Birkenhead, L. & C. J. R. Co.*, 7 Exch. 36; *Goff v. Great Northern R. Co.*, 3 El. & E. 672; *Poulton v. London & S. W. R. Co.*, L. R. 2 Q. B. 534; *Owsley v. Montgomery & W. P. R. Co.*, 37 Ala. 560. But see *Childs v. Bank of Mo.*, 17 Mo. 213.

⁴ *Vance v. Erie R. Co.*, 3 Vroom, 334; *Carter v. Howe Machine Co.*, 51 Md. 290; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Walker v. South Eastern R. Co.*, L. R. 5 C. P. 640. But see *Childs v. Bank of State of Mo.*, 17 Mo. 213; *Gillett v. Mo. Valley R. Co.*, 55 Mo. 315; *Owsley*

v. Montgomery & W. P. R. Co., 37 Ala. 560. In *Green v. London Gen. Omnibus Co.*, 7 C. B. n. s. 290, an action was sustained against the defendants for malicious interference with the plaintiff's rights.

⁵ *Phil. W., & B. R. Co. v. Quigley*, 21 How. 202; *Penn. R. Co. v. Vandiver*, 42 Pa. St. 365, 370; *Whitfield v. South Eastern R. Co.*, El. Bl. & El. 115.

⁶ *York & M. L. R. Co. v. Winans*, 17 How. 30; *Winans v. New York & E. R. Co.*, 21 How. 88; *Winans v. Schenectady & T. R. Co.*, 2 Blatch. 279; *Sayles v. Chicago & N. W. R. Co.*, 1 Biss. 468, 3 Biss. 52; *Turrill v. Ill. Cent. R. Co.*, 3 Biss. 66, 72; *Emigh v. Chicago, B., & Q. R. Co.*, 1 Biss. 400; *Nat. Car Brake Shoe Co. v. L. S. & M. S. R. Co.*, 4 Fed. Rep. 219.

⁷ Chap. V. pp. 127-129.

⁸ Chap. II. pp. 41-43.

⁹ *Nitro-Glycerine Case*, 15 Wall. 524.

plosion of the substances to its property or to the goods of others which were in its custody as a carrier. Several persons, each delivering independently, and without knowledge of the acts of the others, different substances of an explosive character which by combination become dangerous, and each failing to give the company due notice of the contents of his package, may be joined in an action brought by the company.¹

Breach of Public Duty. — The company is responsible to a party for the breach of a public duty causing him special damage, and a privity of contract between him and the company is not necessary to entitle him to an action for the injury.² Thus, if it is bound to keep a bridge at a highway crossing in repair, it is liable to a traveller who suffers an injury from its default.³ Its obligation to keep its railroad in a safe and proper condition for use is imposed not only for the benefit of its servants and passengers, but as a public duty, independent of contract, and coextensive with the lawful use of the road.⁴ Thus, where one company, by agreement or otherwise, has a right to run its trains over the road of another company, the servants of the former company may maintain an action against the company owning the road for an injury occasioned by the improper and negligent management of the switch, which it was the duty of the latter company to keep in the proper place.⁵ Under this rule the company is liable, as elsewhere shown, for injuries resulting from its neglect to fence its track, when required by statute.⁶

Duty to Persons entering on its Premises by Invitation or Inducement. — The company is under a duty to keep its premises safe

¹ Boston & A. R. Co. v. Shanly, 107 Mass. 568.

² Marshall v. York, N., & B. R. Co., 11 C. B. 655; Collett v. London & N. W. R. Co., 16 Q. B. 984; Foulkes v. Metropolitan Dist. R. Co., L. R. 4 C. P. Div. 267, L. R. 5 C. P. Div. 157; Davis v. Lamoille County Plank Road Co., 27 Vt. 602; Penn. & O. C. Co. v. Graham, 63 Pa. St. 290; Broom's Common Law (4th ed.), 655-670.

³ Penn. & O. C. Co. v. Graham, 63 Pa. St. 290. But *quære*, where the defect was caused by a third person without the company's knowledge. Oakland R. Co. v. Fielding, 48 Pa. St. 320.

⁴ Phil. & R. R. Co. v. Derby, 14 How. 468, 485.

⁵ Sawyer v. Rutland & B. R. Co., 27 Vt. 370; Cumberland Valley R. Co. v. Hughes, 11 Pa. St. 141; Nolton v. Western R. Co., 10 How. Pr. 97, 15 N. Y. 444. But see Murch v. Concord R. Co., 29 N. H. 9. Compare Schopman v. Boston & W. R. Co., 9 Cush. 24.

⁶ Clark v. Vt. & C. R. Co., 28 Vt. 103; Illinois Cent. R. Co. v. Kanouse, 39 Ill. 272; Toledo, P., & W. R. Co. v. Rumbold, 40 Ill. 143; McCall v. Chamberlain, 13 Wis. 637; *post*, Chap. XV., INJURIES TO CATTLE.

for public use, where it expressly or by its conduct invites or induces such use, and it is liable to a person using them under such invitation or inducement, who suffers injury from the defective condition of the place used, or the management of the trains at such place.¹ Thus, where it adapts a private crossing to travel, and allows it to be used as a highway, and stations a flagman to give signals of coming trains, it is liable for an injury to a person who, obeying the signal, passes over the crossing, and is injured by the flagman's negligence.² So, also, it has been held liable for negligence to persons whom it allowed to use its track on payment of toll.³ Its duty to keep the approaches to the railroad in a safe condition may extend to places within the limits of a public highway.⁴

But the duty and liability to keep its premises safe for public use do not arise out of a bare license or permission to use its premises.⁵ Still less do they exist in favor of a trespasser, although the company will be liable even to him for a wanton injury.⁶ The company is not liable to persons who, straying from the highways, fall into excavations within its location, where it is in no default as to providing fences or guards.⁷ Nor is it liable where the person entering on its premises has, by the want of ordinary care, contributed to the injury.⁸

The company is under a special duty to persons who come

¹ *Kay v. Penn. R. Co.*, 65 Pa. St. 269; *Pittsburg, Ft. W., & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Tobin v. Portland, S., & P. R. Co.*, 59 Me. 183; *Quimby v. Boston & M. R.*, 69 Me. 340; *Elliott v. Pray*, 10 Allen, 378; *Zoebisich v. Tarbell*, 10 Allen, 385; *Carleton v. Franconia, I., & S. Co.*, 99 Mass. 216; *Combs v. New Bedford Cordage Co.*, 102 Mass. 572; *Mellen v. Morrill*, 126 Mass. 545; *Nickerson v. Tirrell*, 127 Mass. 236; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667.

² *Sweeny v. Old Colony & N. R. Co.*, 10 Allen, 368.

³ *Marfell v. South Wales R. Co.*, 8 C. B. n. s. 525.

⁴ *Quimby v. Boston & M. R.*, 69 Me. 340.

⁵ *Phil. & R. R. Co. v. Hummell*, 44 Pa. St. 375; *Nicholson v. Erie R. Co.*, 41 N. Y. 526; *Sutton v. New York Cent. & H. R. R. Co.*, 66 N. Y. 243, 4 Hun, 760; *Matze v. New York Cent. & H. R. R. Co.*,

1 Hun, 417, 3 Thomp. & C. 513; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen, 368, 373; *Parker v. Portland Publishing Co.*, 69 Me. 173; *Pittsburg, Ft. W., & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Holmes v. North Eastern R. Co.*, L. R. 4 Exch. 254, 257; *Hounsell v. Smyth*, 7 C. B. n. s. 731; *Sullivan v. Waters*, 14 Irish C. L. 460; *Blackmore v. Toronto St. R. Co.*, 38 Upper Can. Q. B. 172. But see *De-laney v. Mil. & St. P. R. Co.*, 33 Wis. 67.

⁶ *Gillis v. Penn. R. Co.*, 59 Pa. St. 129; *Morrissey v. Eastern R.*, 126 Mass. 377. See *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347.

⁷ *Howland v. Vincent*, 10 Met. 371; *Barnes v. Ward*, 9 C. B. 392; *Hounsell v. Smyth*, 7 C. B. n. s. 731; *Hardcastle v. South Yorkshire R. & R. D. Co.*, 4 H. & N. 67; *Binks v. South Yorkshire R. & R. D. Co.*, 3 B. & S. 244.

⁸ *Parker v. Portland Publishing Co.*, 69 Me. 173.

upon its premises for the purpose of doing business with it as a common carrier. In this case it gives an invitation as well as a license, and does so under the expectation of profit therefrom. It must provide and maintain for them safe approaches to the station and safe platforms, and work its engines and machinery in a proper manner with reference to such use. Among those to whom it is under this obligation are persons who come to receive or deliver freight; ¹ passengers arriving or departing by its trains; ² hackmen who carry them to and from the station; ³ and even, it seems, persons who are on the premises to "welcome the coming, speed the parting guest;" ⁴ but it does not extend to those who resort to its premises from curiosity, as to see an excursion party or a distinguished person who is upon a train, or to witness any other spectacle.⁵ The burden of proof is on the plaintiff to show that the place where the injury was received was an approach to the station constructed by the company and under its control.⁶

The license which the company gives to the public generally to enter its stations is revocable at its pleasure as to all persons who are not there on business connected with the road.⁷ The company may use reasonable force to remove from its stations all persons who refuse to comply with its lawful regulations.⁸ The

¹ *Newson v. New York Cent. R. Co.*, 29 N. Y. 383; *Stinson v. New York Cent. R. Co.*, 32 N. Y. 383; *Barton v. New York Cent. & H. R. R. Co.*, 1 Thomp. & C. 297; *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 265; *Toledo, W., & W. R. Co. v. Grush*, 67 Ill. 262; *Illinois Cent. R. Co. v. Hoffman*, 67 Ill. 287; *Campbell v. Portland Sugar Co.*, 62 Me. 552; *New Orleans, M., & C. R. Co. v. Hanning*, 15 Wall. 649; *Shelbyville Lateral Branch R. Co. v. Newark*, 4 Ind. 471; *New Orleans, J., & G. N. R. Co. v. Bailey*, 40 Miss. 395; *Holmes v. North Eastern R. Co.*, L. R. 4 Exch. 254, L. R. 6 Exch. 123; *Wright v. London & N. W. R. Co.*, L. R. 10 Q. B. 298, L. R. 1 Q. B. Div. 252. See *Blakemore v. Bristol & E. R. Co.*, 8 El. & Bl. 1035.

² *Pittsburg, Ft. W., & C. R. Co. v. Bingham*, 29 Ohio St. 364, 373; *Gillis v. Penn. R. Co.*, 59 Pa. St. 129; *Hoffman v. New York Cent. & H. R. R. Co.*, 75 N. Y. 605, 13 Hun, 589; *Knight v. Portland, S., & P. R. Co.*, 56 Me. 234. See *Welfare*

v. London & B. R. Co., L. R. 4 Q. B. 693.

³ *Tobin v. Portland, S., & P. R. Co.*, 59 Me. 183; *Quimby v. Boston & M. R.*, 69 Me. 340.

⁴ *Gillis v. Penn. R. Co.*, 59 Pa. St. 129; *Dublin, W., & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155, I. R. 8 C. L. 531, I. R. 10 C. L. 256.

⁵ *Gillis v. Penn. R. Co.*, 59 Pa. St. 129.

⁶ *Quimby v. Boston & M. R.*, 69 Me. 340.

⁷ *Harris v. Stevens*, 31 Vt. 79; *Pittsburg, Ft. W., & C. R. Co. v. Bingham*, 29 Ohio St. 364, 371; *Johnson v. Chicago, B., & Q. R. Co.*, 51 Iowa, 25; *Barker v. Midland R. Co.*, 18 C. B. 46. See, as to effect of notices and warnings which are not enforced, *Dublin, W., & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155.

⁸ *Commonwealth v. Power*, 7 Met. 596; *Hall v. Power*, 12 Met. 482; *Harris v. Stevens*, 31 Vt. 79; *Gillis v. Penn. R. Co.*, 59 Pa. St. 129, 141.

exclusive nature of the company's right to its location, except at crossings fixed by law, has already been considered.¹

Liability for Torts of Servants. — A railroad company is liable to an action for the tortious acts of its servants while acting in the course of their employment, and within the powers conferred by the charter.² Generally, in determining the liability of a corporation, the acts of the directors in their official capacity are deemed the acts of the corporation; and the same rule applies to superior officers acting within the scope of the authority conferred by the corporation.³

The employees of the company, both of the higher and the subordinate class, who are engaged in service at its stations or on its trains, are presumed to be authorized by it to do such service, and to perform the acts usually incident to their positions; and it is liable for their tortious acts which are performed in the course of such service.⁴ The conductor is, by usage, its responsible agent in the conduct of the train.⁵ A servant has not an implied authority to do acts outside of the kind of service in which he is employed.⁶ Whether an act of the servant is within the course of his employment is a question of fact for the jury under the instructions of the court.⁷

The company is liable for the acts of its servants in the course

¹ *Ante*, Chap. VII. p. 159.

² *Lowell v. Boston & L. R. Co.*, 23 Pick. 24, 31; *Moore v. Fitchburg R. Co.*, 4 Gray, 465; *Burton v. Phil. W., & B. R. Co.*, 4 Harring. (Del.) 252; *Brokaw v. New Jersey R. & T. Co.*, 3 Vroom, 328; *Crawfordsville & W. R. Co. v. Wright*, 5 Ind. 252; *State v. Morris & E. R. Co.*, 3 Zab. 360, 367; *Phil. W., & B. R. Co. v. Quigley*, 21 How. 202; *Penn. R. Co. v. Vandiver*, 42 Pa. St. 365; *Donaldson v. Miss. & M. R. Co.*, 18 Iowa, 280; *Passenger R. Co. v. Young*, 21 Ohio St. 518; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *Tebbutt v. Bristol & E. R. Co.*, L. R. 6 Q. B. 73.

³ *Brokaw v. New Jersey R. & T. Co.*, 3 Vroom, 328, 332; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *ante*, Chap. II. pp. 24, 32. See *Vanderbilt v. Richmond Turnp. Co.*, 2 N. Y. 479.

⁴ *Giles v. Taff Vale R. Co.*, 2 El. & Bl.

822; *Goff v. Great Northern R. Co.*, 3 El. & Bl. 672; *Poulton v. London & S. W. R. Co.*, L. R. 2 Q. B. 534; *St. Louis, A., & C. R. Co. v. Dalby*, 19 Ill. 353, 375; *Drew v. Sixth Av. R. Co.*, 26 N. Y. 49; *Drew v. Sixth Av. R. Co.*, 1 Abbott Ct. App. 556; *Passenger R. Co. v. Young*, 21 Ohio St. 518.

⁵ *Rauch v. Lloyd*, 31 Pa. St. 358, 365.

⁶ *Edwards v. London & N. W. R. Co.*, L. R. 5 C. P. 445; *Walker v. South Eastern R. Co.*, L. R. 5 C. P. 640; *Allen v. London & S. W. R. Co.*, L. R. 6 Q. B. 65; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; *Mali v. Lord*, 39 N. Y. 381; *Flower v. Penn. R. Co.*, 69 Pa. St. 210, 214; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413; *Hoar v. Maine Cent. R. Co.*, 70 Me. 65; *Robertson v. New York & E. R. Co.*, 22 Barb. 91.

⁷ *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274; *Redding v. South Carolina R. Co.*, 3 S. C. n. s. 1.

of their employment, both in the rightful use and in the abuse of the powers conferred upon them; and when they keep within the course of their employment, it is responsible for their negligence or wrongful act, although they are acting against its instructions, or even wilfully.¹ This rule applies where the servant exercises a power conferred by the company on an occasion or under circumstances when its exercise is unlawful, as when a conductor or other servant, having the power to remove passengers from the company's carriages who have no right to remain in them, removes a passenger who has such right;² and also when the servant so authorized uses the power in a case when it is lawful to use it, but in an unlawful manner, as with excessive force, or with a wrongful kind of force, or at a time or place when a regard for human life and limb forbids its use.³ The company is

¹ Phil. & R. R. Co. v. Derby, 14 How. 468; Rounds v. Delaware, L., & W. R. Co., 64 N. Y. 129, 136, 3 Hun, 329; Cohen v. Dry Dock, E. B., & B. R. Co., 69 N. Y. 170, 40 N. Y. Superior, 368; Hibbard v. New York & E. R. Co., 15 N. Y. 455, 467; Higgins v. Watervliet Turnp. Co., 46 N. Y. 23; Gleadell v. Thomson, 56 N. Y. 194; Shea v. Sixth Av. R. Co., 62 N. Y. 180; Meyer v. Second Av. R. Co., 8 Bosw. 305; Day v. Brooklyn City R. Co., 12 Hun, 435; Howe v. Newmarch, 12 Allen, 49; Ramsden v. Boston & A. R. Co., 104 Mass. 117; Coleman v. New York & N. H. R. Co., 106 Mass. 160; Wilton v. Middlesex R. Co., 107 Mass. 108, 125 Mass. 130; Pittsburg, A., & M. Pass. Co. v. Donahue, 70 Pa. St. 119; Robinson v. Webb, 11 Bush, 464, 482; Yates v. Squires, 19 Iowa, 26; Noble v. Cunningham, 74 Ill. 51; Duggins v. Watson, 15 Ark. 118, 127; Evansville & C. R. Co. v. Baum, 28 Ind. 70; Jeffersonville R. Co. v. Rogers, 38 Ind. 116; Indianapolis, P., & C. R. Co. v. Anthony, 43 Ind. 183; Terre Haute & I. R. Co. v. Graham, 46 Ind. 239; Terre Haute & I. R. Co. v. Fitzgerald, 47 Ind. 79; Indianapolis & V. R. Co. v. McClaren, 62 Ind. 566; Redding v. South Carolina R. Co., 3 S. C. n. s. 1; Peeples v. Brunswick & A. R. Co., 60 Ga. 281; Georgia R. Co. v. Newsome, 60 Ga. 492; Perkins v. Mo., K., & T. R. Co., 55 Mo. 201, 212; Gillett v. Mo. Valley R. Co., 55 Mo. 315; Passenger R. Co. v. Young, 21 Ohio St. 518;

Limpus v. London Gen. Omnibus Co., 1 Hurl. & C. 526. But see Crocker v. New London, W., & P. R. Co., 24 Conn. 249; Vanderbilt v. Richmond Turnp. Co., 2 N. Y. 479; Selma, R., & D. R. Co. v. Webb, 49 Ala. 240.

² Moore v. Fitchburg R. Co., 4 Gray, 465; Higgins v. Watervliet Turnp. Co., 46 N. Y. 23; Rounds v. Delaware, L., & W. R. Co., 64 N. Y. 129, 3 Hun, 329; Great Western R. Co. v. Miller, 19 Mich. 305; Chicago, B., & Q. R. Co. v. Bryan, 90 Ill. 126; Poulton v. London & S. W. R. Co., L. R. 2 Q. B. 534; Bayley v. Manchester, S., & L. R. Co., L. R. 8 C. P. 148, L. R. 7 C. P. 415.

³ Jackson v. Second Av. R. Co., 47 N. Y. 274; Rounds v. Delaware, L., & W. R. Co., 64 N. Y. 129, 3 Hun, 329; Cohen v. Dry Dock, E. B., & B. R. Co., 69 N. Y. 170, 8 J. & S. 368; Hewett v. Swift, 3 Allen, 420; Howe v. Newmarch, 12 Allen, 49; Holmes v. Wakefield, 12 Allen, 580; Ramsden v. Boston & A. R. Co., 104 Mass. 117; Penn. R. Co. v. Vandiver, 42 Pa. St. 365; Brokaw v. New Jersey R. & T. Co., 3 Vroom, 328; Seymour v. Greenwood, 7 Hurl. & N. 355, 6 Hurl. & N. 359; Walker v. South Eastern R. Co., L. R. 5 C. P. 640, 643. "A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he

responsible, also, for the circumstances of aggravation accompanying the act for which it is liable.¹

The doctrine, which once obtained, that the master is not liable for the wilful wrong of his servant² is now "understood as referring to an act of positive and designed injury not done with a view to the master's service, or for the purpose of executing his orders."³

The company, however, is not liable for the torts of a servant outside of the course of his employment, as when he is acting with a view to effect an independent purpose of his own, and not to execute the orders of the company; and he is not deemed in such act to be its servant, although employed generally at the time in its service.⁴ It is here, as is often the case, easier to state the limitation of the doctrine than to apply it. Whether the servant did the act with a view to his master's service, or to serve a purpose of his own, is a question for the jury.⁵

The authority to use force may be derived from express order, or from ratification,⁶ or from rules and regulations,⁷ or from a direction or duty which implies the use of force.⁸ The authority

is held answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment." *Bayley v. Manchester, S., & L. R. Co.*, L. R. 7 C. P. 415, 420, Willes, J.

¹ *Sanford v. Eighth Av. R. Co.*, 23 N. Y. 343; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202.

² *McManus v. Crickett*, 1 East, 106 (1800), Lord Kenyon.

³ *Cohen v. Dry Dock, E. B., & B. R. Co.*, 69 N. Y. 170, 174.

⁴ *Rounds v. Delaware, L., & W. R. Co.*, 64 N. Y. 129, 136; *Cohen v. Dry Dock, E. B., & B. R. Co.*, 69 N. Y. 170; *Mali v. Lord*, 39 N. Y. 381; *Fraser v. Freeman*, 43 N. Y. 566; *Higgins v. Watervliet Turnp. Co.*, 46 N. Y. 23, 27; *Isaacs v. Third Av. R. Co.*, 47 N. Y. 122; *Jackson v. Second Av. R. Co.*, 47 N. Y. 274, 277; *Hughes v. New York & N. H. R. Co.*, 36 N. Y. Superior, 222; *Stewart v. Brooklyn C. R. Co.*, 9 Reporter, 759; *Howe v. Newmarch*, 12 Allen, 49, 57;

De Camp v. Miss. & M. R. Co., 12 Iowa, 348; *Evansville & C. R. Co. v. Baum*, 26 Ind. 70; *Illinois Cent. R. Co. v. Downey*, 18 Ill. 259; *Phil., G., & N. R. Co. v. Wilt*, 4 Whart. 143; *Pittsburg, A., & M. Pass. R. Co. v. Donahue*, 70 Pa. St. 119; *Penn. R. Co. v. Toomey*, 37 Leg. Int. 105; *New Orleans, J., & G. N. R. Co. v. Harrison*, 48 Miss. 112; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 40; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413; *Croft v. Alison*, 4 B. & Ald. 590; *Limpus v. London Gen. Omnibus Co.*, 1 Hurl. & C. 526. See *Nashville & C. R. Co. v. Starnes*, 9 Heisk. 52.

⁵ *Cohen v. Dry Dock, E. B., & B. R. Co.*, 69 N. Y. 170, 40 N. Y. Superior, 368.

⁶ *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *Roe v. Birkenhead, C., & L. R. Co.*, 7 Exch. 36.

⁷ *Brokaw v. New Jersey R. & T. Co.*, 3 Vroom, 328, 331, 332.

⁸ *Hewett v. Swift*, 3 Allen, 420, 425; *Howe v. Newmarch*, 12 Allen, 49, 56; *Higgins v. Watervliet Turnp. Co.*, 46 N. Y. 23, 26.

of agents to do acts on behalf of the company which it cannot itself lawfully do, or which are outside of the course of their employment, exists only when expressly conferred or implied from ratification.¹ Its capacity to bind itself by acts which are *ultra vires* will be considered in another connection.² It is not a defence that the particular act by which the injury was inflicted was not authorized by the charter.³

The liability of the company as a common carrier for injuries to passengers committed by its servants is governed by the peculiar obligations of its contract as implied by law, and not merely by the general duty incumbent on all persons in their conduct towards each other, and growing out of social relations; and it is liable on its contract for safe transportation, although the particular servant inflicting the injury is at the time acting beyond his actual or implied authority.⁴ Some authorities, however, do not seem to observe this distinction, and impose on it the same liability to passengers as to strangers.⁵

The servant is liable to the injured person for his own wrongful act; but an officer of a corporation who merely transmits its order to subordinate servants, without doing anything to make it his own, is not liable.⁶ The servant is liable over to the company for the damages resulting from his negligence, including, when notified of the pending suit, counsel fees and costs.⁷

What makes the Wrong-doer a Servant of the Company.—The question, whether one railroad company or some other company or individual is liable for the negligence of a servant, will depend on the question whether he is the servant of one or another company each of which is using the same track or has some con-

¹ *Carter v. Howe Machine Co.*, 51 Md. 290; *Roe v. Birkenhead, L. & C. J. R. Co.*, 7 Exch. 36; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314; *Poulton v. London & S. W. R. Co.*, L. R. 2 Q. B. 534; *Allen v. London & S. W. R. Co.*, L. R. 6 Q. B. 65; *Edwards v. London & N. W. R. Co.*, L. R. 5 C. P. 445; *Walker v. South Eastern R. Co.*, L. R. 5 C. P. 640.

² *Post*, Chap. XIX. See *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 59; *Brokaw v. New Jersey R. & T. Co.*, 59 Vroom, 326, 332; *Jones v. Western Vt. R. Co.*, 27 Vt. 399.

³ *South & N. A. R. Co. v. Chappell*,

61 Ala. 527; *National Bank v. Graham*, 100 U. S. 699.

⁴ *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Milwaukie & M. R. Co. v. Finney*, 10 Wis. 388; *Weed v. Panama R. Co.*, 17 N. Y. 362; *Sherley v. Billings*, 8 Bush, 147.

⁵ *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; *Evansville & C. R. Co. v. Baum*, 26 Ind. 70.

⁶ *Hewett v. Swift*, 3 Allen, 420.

⁷ *Grand Trunk R. Co. v. Latham*, 63 Me. 177; *Galena & C. U. R. Co. v. Welch*, 24 Ill. 31; *Chicago & R. I. R. Co. v. Hutchins*, 34 Ill. 108.

nection with the motive power. As a general rule, the person committing the injury will be considered the servant of the company which employs and pays him, exercises the right to discharge him, and whose orders he is bound to obey.¹ Thus, where the plaintiff was thrown from his wagon in a collision with a railroad car belonging to one company, but drawn by horses owned by another company, and driven by a driver in the latter's employ, the latter company was held liable for the injury occasioned by the driver's negligence.²

The company may make itself liable by contract for the tortious acts of the servants of another company. Thus, where the owners of passenger cars agreed to carry a passenger, although the motive power was furnished by the State, between which and the company there was a contract for the running of the cars, and the power was under the control of the State's agents, through whose negligence the passenger was injured, the owners of the passenger cars were held liable. The servants of the State were, as between the passenger and the owners of the cars, *pro hac vice* the servants of such owners.³

Two companies, or a company and an individual, may render themselves both liable for the torts of a servant, where, although he may be employed by one, both are partners in the profits of the business in which the injury is inflicted, or are joint participators in the wrong.⁴ Thus, a company organized under a charter from the State of Pennsylvania was held liable for the infraction of a patent-right respecting cars which were run on its track, although the entire capital stock of the company was held by a connecting railroad company incorporated in Maryland, which operated the road by its agents,—it appearing that the Pennsylvania company owned the motive power, and contributed to the expense of operating the railroad, of fitting and repairing the cars, and paying the officers and agents.⁵

¹ *Blake v. Ferris*, 5 N. Y. 48; *Boniface v. Relyea*, 6 Rob. (N. Y.) 397; *Rauch v. Lloyd*, 31 Pa. St. 358; *Ohio & M. R. Co. v. Davis*, 23 Ind. 553; *Ballou v. Farnum*, 9 Allen, 47; *Coggin v. Cent. R. Co.*, 62 Ga. 685; *Reedie v. London & N. W. R. Co.*, 4 Exch. 244.

² *Weyant v. New York & H. R. Co.*, 3 Duer, 360.

³ *Peters v. Rylands*, 20 Pa. St. 497;

McElroy v. Nashua & L. R. Co., 4 Cush. 400.

⁴ *Peters v. Ryland*, 20 Pa. St. 497; *Barter v. Wheeler*, 49 N. H. 9, 27; *Foulkes v. Metropolitan Dist. R. Co.*, L. R. 5 C. P. Div. 157, L. R. 4 C. P. Div. 267.

⁵ *York & M. L. R. Co. v. Winans*, 17 How. 30.

A company, having through its servants the exclusive control and direction of a train, is liable for injuries caused by the negligent management of the train by its servants, or by a defective track, although the engine and cars,¹ or the railroad belong to another company,² or the company is using the land of a private owner outside of its location by his consent,³ or the negligence of another company using the same track contributed to the injury.⁴ A company is liable to passengers riding on its trains, although they purchased their tickets of other companies.⁵

Two companies, by their servants, being both in control of a train, are each liable for an injury caused by negligence in its management.⁶ If an injury happens by a collision between the trains of two companies caused by their common negligence, they are liable in a joint action to the injured party.⁷

A passenger riding in a train, over whose movement he has no control, is not so identified with the company which is operating it as to have imputed to him the negligence of its servants, and can maintain an action against another company for an injury suffered by him in a collision resulting from the concurring negligence of both companies.⁸ Nor does the concurring negligence of any third person defeat the injured person's right to recover against a company by whose negligence he has suffered.⁹

A person riding in the carriage of another by invitation, and having no control over its movement, has been held, in case of a collision with a railway train, not to be affected by the contribu-

¹ *Fletcher v. Boston & M. R.*, 1 Allen, 9.

² *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347; *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497; *Seymour v. Chicago, B., & Q. R. Co.*, 3 Biss. 43; *Great Western R. Co. v. Blake*, 7 Hurl. & N. 987; *John v. Bacon*, L. R. 3 C. P. 437.

³ *Commonwealth v. Boston & L. R. Co.*, 126 Mass. 61.

⁴ *Eaton v. Boston & L. R. Co.*, 11 Allen, 500.

⁵ *Foulkes v. Metropolitan Dist. R. Co.*, L. R. 5 C. P. Div. 167, L. R. 4 C. P. Div. 267.

⁶ *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347; *Vary v. B., C., R., & M. R. Co.*, 42 Iowa, 246.

⁷ *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492, 6 Duer, 382. But see

Berringer v. Great Eastern R. Co., L. R. 4 C. P. Div. 163.

⁸ *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492, 6 Duer, 382; *Barrett v. Third Av. R. Co.*, 45 N. Y. 628; *Bennett v. New Jersey R. & T. Co.*, 7 Vroom, 225; *Danville, L., & N. Turnp. Co. v. Stewart*, 2 Met. (Ky.) 119. *Contra*, *Thorogood v. Bryan*, 8 C. B. 115; *Child v. Hearn*, L. R. 9 Exch. 176; *Armstrong v. Lancashire & Y. R. Co.*, L. R. 10 Exch. 47; *Lockhart v. Lichtenthaler*, 46 Pa. St. 151. See *Prideaux v. Mineral Point*, 43 Wis. 513, 526.

⁹ *Sheridan v. Brooklyn City & N. R. Co.*, 36 N. Y. 39; *Webster v. Hudson River R. Co.*, 38 N. Y. 260; *Slater v. Mercereau*, 64 N. Y. 133, 147.

tory negligence of the driver, if he is a fit person to manage a horse;¹ but, in view of the conflicting authorities, the doctrine is open to further consideration.² The wife will be affected by her husband's negligence when riding in a carriage of which he is the driver.³

Liability of the Company for Injuries committed by Lessees and others using its Track, and Liability of Lessees. — The company cannot, in the absence of special statute authority and exemption, divest itself of responsibility for the torts of persons operating its road by transferring its corporate powers, or leasing the road to them. It cannot by its own act absolve itself from its public obligations without the consent of the legislature.⁴ It is liable for injuries to its passengers caused by the negligence of another company which it allows to use its road.⁵

The lease of a railroad under due authority of law effects a transfer of rights and liabilities in its management, so that the corporation owning the railroad is discharged from responsibility for the lessee's torts;⁶ but the corporation will remain liable if it continues, notwithstanding the lease, to operate the railroad,⁷ or allows it to be operated in its corporate name,⁸ or fails to require other companies using the track to take proper precautions where it has the power to require them.⁹ Lessees who permit another company under contract to use the road are liable for its torts.¹⁰ Statutes imposing police and other duties and liabilities on railroad companies are usually construed to apply to com-

¹ *Robinson v. New York Cent. & H. R. R. Co.*, 66 N. Y. 11, 65 Barb. 146; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Cosgrove v. New York Cent. & H. R. R. Co.*, 13 Hun, 329; *Massoth v. Del. & H. C. Co.*, 64 N. Y. 524.

² *Prideaux v. Mineral Point*, 43 Wis. 513; *Otis v. Janesville*, 47 Wis. 422.

³ *Carlisle v. Sheldon*, 38 Vt. 440.

⁴ *Nelson v. Vt. & C. R. Co.*, 26 Vt. 717; *York & M. L. R. Co. v. Winans*, 17 How. 30; *Alexandria & W. R. Co. v. Brown*, 17 Wall. 445; *Langley v. Boston & M. R.*, 10 Gray, 103; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355; *Abbot v. Gloversville & K. Horse R. Co.*, 21 Albany L. J. 193. See *Graham v.*

North Eastern R. Co., 18 C. B. N. s. 229; *Thompson v. New Orleans & C. R. Co.*, 10 La. An. 403.

⁵ *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90, 1 Biss. 412, 453; *McElroy v. Nashua & L. R. Co.*, 4 Cush. 400.

⁶ *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68; *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425, 5 Hun, 165. See *Norton v. Wiswall*, 26 Barb. 618.

⁷ *Ballou v. Farnum*, 9 Allen, 47, 11 Allen, 73; *Alexandria & W. R. Co. v. Brown*, 17 Wall. 445.

⁸ *Bower v. B. & S. W. R. Co.*, 42 Iowa, 546.

⁹ *Delaware, L., & W. R. Co. v. Salmon*, 10 Vroom, 299.

¹⁰ *Pittsburg, C. & St. L. R. Co. v. Campbell*, 86 Ill. 443.

panies and persons who are in possession under contracts with, or by permission of, the company owning the railroad.¹

The lessees of a railroad are presumed, by virtue of a lease duly authorized by law, to succeed to the powers and obligations of the lessor corporation, and are therefore liable for the torts of their servants in its management.² They cannot, it has been held, set up in defence the illegality of the lease.³ Some statutes make the lessor company liable for the negligence of the lessee's servant in the working of the road.⁴

Statutes which for the public security make certain conditions in the construction and use of the railroad are sometimes held to affect both the corporation owning the road, and other parties using the road by its permission under a lease or contract authorized by law. Thus, if the duty to fence is prescribed, and in consequence of an omission of the duty cattle are killed by the trains of the company which uses the road under lease or contract, such company and also the company owning the railroad are both liable, — the former for using the road, and the latter for permitting its use in a defective condition.⁵ But some statutes are construed to impose liability resulting from the omission of the legal duty only on the company, whether lessor or lessee, which inflicted the injury.⁶ The lessee by whose act cattle were killed was held not relieved from liability under a statute by the fact that by the terms of the lease his trains were to be operated in subordination

¹ *Linfield v. Old Colony R. Co.*, 10 Cush. 562; *Davis v. Providence & W. R. Co.*, 121 Mass. 134; *Stephen v. Smith*, 29 Vt. 160; *Pierce v. Concord R. Co.*, 51 N. H. 590; *Hall v. Brown*, 54 N. H. 495, 58 N. H. 93; *Lamphear v. Buckingham*, 33 Conn. 237; *McCall v. Chamberlain*, 13 Wis. 637.

² *Sprague v. Smith*, 29 Vt. 421; *Ma-honey v. Atlantic & St. L. R. Co.*, 63 Me. 68; *Davis v. Providence & W. R. Co.*, 121 Mass. 134; *Pierce v. Concord R. Co.*, 51 N. H. 590; *Hall v. Brown*, 54 N. H. 495, 58 N. H. 93; *McMillan v. Mich. S. & N. I. R. Co.*, 16 Mich. 79, 102; *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425, 5 Hun, 165; *Wasmer v. D. L. & W. R. Co.*, 80 N. Y. 212.

³ *McCluer v. Manchester & L. R. Co.*, 13 Gray, 124; *Feital v. Middlesex R. Co.*, 109 Mass. 398; *Sprague v. Smith*, 29 Vt. 421, 425.

⁴ *Quested v. Newburyport Horse R. Co.*, 127 Mass. 204.

⁵ *Whitney v. Atlantic & St. L. R. Co.*, 44 Me. 362; *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 95; *Wyman v. Penobscot & K. R. Co.*, 46 Me. 162; *Webb v. Portland & K. R. Co.*, 57 Me. 117; *Bean v. Atlantic & St. L. R. Co.*, 63 Me. 293; *Ingersoll v. Stockbridge & P. R. Co.*, 8 Allen, 438; *Illinois Cent. R. Co. v. Kanouse*, 39 Ill. 272; *Toledo, P., & W. R. Co. v. Rumbold*, 40 Ill. 143; *Nelson v. Vt. & C. R. Co.*, 26 Vt. 717; *Clement v. Canfield*, 28 Vt. 302; *McGrath v. New York Cent. & H. R. R. Co.*, 63 N. Y. 522. But see *Parker v. Rensselaer & S. R. Co.*, 16 Barb. 315; *Murch v. Concord R. Co.*, 29 N. H. 935.

⁶ *Stephens v. Davenport & St. P. R. Co.*, 36 Iowa, 327; *Clary v. Iowa Midland R. Co.*, 37 Iowa, 344.

to time-tables fixed by the lessor, and that the latter was to keep up repairs and fences.¹

Mortgagees and Trustees. — The company is not liable, at common law or under statutes imposing liability for injuries resulting in death, for the negligence of mortgagees who are operating the road.² Trustees of bondholders, under a mortgage, who are engaged in operating it, are liable for the torts of their servants;³ and, in general, when acting under a mortgage made with due authority of law, they succeed to the duties and liabilities of the corporation.⁴

Receivers. — A railroad corporation is not liable in a civil or criminal proceeding for the torts committed in its management, while it is under the exclusive control of receivers appointed by a competent court. The possession of the receiver is the possession of the court.⁵ The company will, however, remain liable if it retains the entire or partial control of the road, or allows the receiver to use its name.⁶ Such receivers, while operating the road only in their official capacity, stand on the footing of public officers, and are not personally liable for the torts of servants whom they employ in their official capacity;⁷ but they may be sued by leave of court, and satisfaction obtained for such injuries out of the funds of the company in their hands.⁸ The action, when brought against the receivers, will be determined by the same principles as if the corporation were the defendant.⁹ Some authorities,

¹ *Clary v. Iowa Midland R. Co.*, 37 Iowa, 344.

² *State v. Consolidated European & N. A. R. Co.*, 67 Me. 479. But see *Grand Tower Man. & T. Co. v. Ullman*, 89 Ill. 244.

³ *Ballou v. Farnum*, 9 Allen, 47, 11 Allen, 73; *Sprague v. Smith*, 29 Vt. 421; *Lamphear v. Buckingham*, 33 Conn. 237; *Rogers v. Wheeler*, 43 N. Y. 598; *Barter v. Wheeler*, 49 N. H. 9.

⁴ *Daniels v. Hart*, 118 Mass. 543.

⁵ *State v. Vt. Cent. R. Co.*, 30 Vt. 108; *Ohio & M. R. Co. v. Davis*, 23 Ind. 553 (qualifying *Ohio & M. R. Co. v. Fitch*, 20 Ind. 498, and *McKinney v. Ohio & M. R. Co.*, 22 Ind. 99). See *Hopkins v. Connell*, 2 Tenn. Ch. 323; *Wabash R. Co. v. Brown*, 5 Brad. (Ill.) 590.

⁶ *Alexandria & W. R. Co. v. Brown*, 17 Wall. 445.

⁷ *Cardot v. Barney*, 63 N. Y. 281; *Hopkins v. Connell*, 2 Tenn. Ch. 323; *Erwin v. Davenport*, 9 Heisk. 44. The possession of the receiver is not necessarily a valid defence at law, and the court which appointed him may in its discretion allow the action to proceed. *Hills v. Parker*, 111 Mass. 508.

⁸ *Meara v. Holbrook*, 20 Ohio St. 137; *Klein v. Jewett*, 11 C. E. Green, 474; *Jordan v. Wells*, 3 Woods, 527; *Kennedy v. Indianapolis & C. R. Co.* (U. S. C. C., S. D. Ohio), 10 Reporter, 359, 11 Cent. L. J. 89.

⁹ *Meara v. Holbrook*, 20 Ohio St. 137; *Potter v. Bunnell*, 20 Ohio St. 150; *Klein v. Jewett*, 11 C. E. Green, 474.

however, impose on them a full personal liability as common carriers when they are doing business as such.¹

Liability incurred by a Consolidation.—A corporation which acquires by a purchase or consolidation the roads of other companies, may, by force of the statute which authorizes the transfer, become liable for the antecedent torts of such companies.²

Liability for Contractors and their Servants.—The company is, in general, responsible for the torts of only such persons as sustain towards it the relation of agents or servants. The relation of master and servant does not arise where the employee, in the exercise of an independent employment, and not being under the immediate direction of the employer, is acting in pursuance of an entire contract, by which he has agreed to execute a job or piece of work on certain terms. When the work is so let out, the employer is not liable for the acts of the contractor, or of his sub-contractors, or of the servants of either, the persons thus employed not being in law his servants. The test which determines whether the relation is that of master and servant, or of contractor and contractee, is, whether the employer retains the power of selecting, directing, and discharging the workmen, the retention of which power makes him responsible as a master, and the surrender of which relieves him of liability as such.³

This doctrine (overruling *Bush v. Steinman* (1799), 1 Bos. & Pul. 404) is well established in England.⁴ Thus, where the company had let out a portion of its line for construction to a contractor, and workmen employed by him in constructing a bridge over a public highway negligently caused the death of a person passing along the highway, by allowing a stone to fall upon him, the company was held not liable, notwithstanding

¹ *Blumenthal v. Brainerd*, 38 Vt. 402; *Newell v. Smith*, 49 Vt. 255; *Paige v. Smith*, 99 Mass. 395; *Kinney v. Crocker*, 18 Wis. 74; *Allen v. Central R. Co.*, 42 Iowa, 683; *Wabash R. Co. v. Brown*, 5 Brad. (Ill.) 590, 595; *Kain v. Smith*, 80 N. Y. 458.

² *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397; *Chicago, R. I., & P. R. Co. v. Moffitt*, 75 Ill. 524; *Coggin v. Central R. Co.*, 62 Ga. 685.

³ *Brackett v. Lubke*, 4 Allen, 138; *Forsyth v. Hooper*, 11 Allen, 419.

⁴ *Knight v. Fox*, 5 Exch. 721; *Overton v. Freeman*, 11 C. B. 867; *Peachey v. Rowland*, 18 C. B. 182; *Rourke v. White Moss Colliery Co.*, L. R. 2 C. P. Div. 205; *Pearson v. Cox*, L. R. 2 C. P. Div. 369; *Richmond v. Russell*, 11 Cas. Ct. Session, 2d series (Scotch), 1035, 12 Cas. Ct. Session, 2d series (Scotch), 887; *Gilbert v. Halpin*, 3 Ir. Jur. n. s. 300.

in the contract it reserved the power of removing careless and incompetent workmen.¹ So, where the workmen employed by a contractor who had entered into an agreement with the company to do the work, while excavating a road for the purpose of making an embankment for the railway, cut into a drain or culvert, whereby the water was discharged upon the plaintiff's land, and his crops were damaged, the company was held not responsible, although it employed its own surveyor to superintend the work.² The persons doing the injury were selected and controlled, not by the company, but by the contractor, and therefore deemed to be his servants only.

The same doctrine prevails in this country.³ Thus, where the company has let out the construction of its road to a person, it is not liable for injuries caused by the negligence or unlawful conduct of such contractor, or of any sub-contractor, or of the servants of either, in the blasting of rocks thrown on an adjoining owner's land;⁴ the setting of fires which escape and burn property outside of the location;⁵ an unlawful entry on land;⁶ the use of nitro-glycerine in blasting;⁷ leaving down the fence, whereby a land-owner's cattle strayed;⁸ leaving stones in the

¹ *Reedie v. London & N. W. R. Co.*, 4 Exch. 244; *Hobbit v. London & N. W. R. Co.*, 4 Exch. 254.

² *Steel v. South Eastern R. Co.*, 16 C. B. 550.

³ *Hilliard v. Richardson*, 3 Gray, 349; *Linton v. Smith*, 8 Gray, 147; *Brackett v. Lubke*, 4 Allen, 138; *Forsyth v. Hooper*, 11 Allen, 419; *Blake v. Ferris*, 5 N. Y. 48; *Pack v. New York*, 8 N. Y. 222; *Storrs v. Utica*, 17 N. Y. 104; *Slater v. Mercereau*, 64 N. Y. 138; *Blackwell v. Wiswall*, 24 Barb. 355; *Norton v. Wiswall*, 26 Barb. 618; *Vanderpool v. Husson*, 28 Barb. 196; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *Barrett v. Singer Man. Co.*, 1 Sweeny, 545; *Eaton v. European & N. A. R. Co.*, 59 Me. 520; *Painter v. Pittsburg*, 46 Pa. St. 218; *Allen v. Willard*, 57 Pa. St. 374; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Wray v. Evans*, 80 Pa. St. 102; *Hass v. Phil. & S. M. S. Co.*, 88 Pa. St. 269; *Boswell v. Laird*, 8 Cal. 469; *Carman v. Steubenville & I. R. Co.*, 4 Ohio St. 399; *West v. St. Louis, V., & T. H. R. Co.*, 63 Ill. 545; *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365, 372; *Wright v. Holbrook*, 52 N. H. 120; *Carter v. Berlin Mills Co.*, 58 N. H.

52; *Blattenberger v. Little Schuylkill Nav. Co.*, 2 Miles (Penn.), 309; *Barry v. St. Louis*, 17 Mo. 121; *Morgan v. Bowman*, 22 Mo. 538; *De Forrest v. Wright*, 2 Mich. 368; *Kansas Cent. R. Co. v. Fitzsimmons*, 18 Kan. 34, 22 Kan. 686; *Cunningham v. International R. Co.*, 51 Tex. 503; *Camp v. Church Wardens*, 7 La. An. 321. But see *Wiswall v. Brinson*, 10 Ired. 554; *Stone v. Codman*, 15 Pick. 297; *Lowell v. Boston & L. R. Co.*, 23 Pick. 24; *New York v. Bailey*, 2 Denio, 433; *Stone v. Cheshire R. Co.*, 19 N. H. 427.

⁴ *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178; *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 432; *Tibbetts v. Knox & L. R. R. Co.*, 62 Me. 437.

⁵ *Eaton v. European & N. A. R. Co.*, 59 Me. 520; *Callahan v. Burlington & M. R. Co.*, 23 Iowa, 562.

⁶ *Clark v. Vt. & C. R. Co.*, 28 Vt. 103; *Eaton v. European & N. A. R. Co.*, 59 Me. 520.

⁷ *Cuff v. Newark & N. Y. R. Co.*, 6 Vroom, 17.

⁸ *Clark v. Vt. & C. R. Co.*, 28 Vt.

highway to the injury of travellers;¹ drawing cars on the railroad, the horses and drivers being under the control of the contractor;² the erection of buildings under a contract, with specifications;³ the transfer of freight at a certain rate agreed upon from vessels to the railroad, although the machine belonged to the company;⁴ or the working of trains and engines upon the track during the construction of the road, whereby personal injuries were suffered by persons riding upon them or engaged upon the track.⁵

The company is not liable where the act complained of is purely collateral to the matter contracted to be done, and arises indirectly in the course of the performance of the work.⁶

The Company liable when it authorizes or participates in the Contractor's Tortious Act. — To the general rule there are some exceptions which require to be noted. It does not protect an employer who has co-operated in the injurious act, and become a joint participator in the wrong. In such a case the relation of master and servant need not exist in order to render the company liable for the acts of persons whom it has employed to do the tortious act. Therefore it is liable when it authorizes a person who carries on an independent employment to do an act which necessarily produces the injury, or employs him to do an unlawful act, or one amounting to a nuisance,⁷ or the injury results directly from the acts which the contractor agreed to do;⁸ but it will be presumed

103; *Clark v. Hannibal & St. J. R. Co.*, 36 Mo. 202. *Contra*, *Chicago, St. P., & F. R. Co. v. McCarthy*, 20 Ill. 385.

¹ *Pawlet v. Rutland & W. R. Co.*, 28 Vt. 297.

² *Schular v. Hudson River R. Co.*, 38 Barb. 653.

³ *Hunt v. Penn. R. Co.*, 51 Pa. St. 475.

⁴ *King v. New York Cent. & H. R. R. Co.*, 66 N. Y. 181, 4 Hun. 769.

⁵ *Kansas Cent. R. Co. v. Fitzsimmons*, 18 Kan. 34; *Meyer v. Midland Pacific R. Co.*, 2 Neb. 319; *Union Pacific R. Co. v. Hause*, 1 Wyoming, 27; *Central R. & B. Co. v. Grant*, 46 Ga. 417; *Cunningham v. International R. Co.*, 51 Tex. 503.

⁶ *Hole v. Sittingbourne & S. R. Co.*, 6 Hurl. & N. 488, 497; *Robbins v. Chicago*, 4 Wall. 657, 679, 2 Black, 418; *St. Paul Water Co. v. Ware*, 16 Wall. 566, 577.

⁷ *Ellis v. Sheffield Gas Consumers Co.*, 2 El. & Bl. 767; *Overton v. Freeman*, 11 C. B. 867, 873, 874; *Peachey v. Rowland*, 13 C. B. 182; *Reedie v. London & N. W. R. Co.*, 4 Exch. 244; *Hobbit v. London & N. W. R. Co.*, 4 Exch. 254; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *King v. New York Cent. & H. R. R. Co.*, 66 N. Y. 181, 4 Hun. 769; *Congreve v. Morgan*, 5 Duer, 495; *Norton v. Wiswall*, 26 Barb. 618, 627; *Eaton v. European & N. A. R. Co.*, 59 Me. 520, 532, 534; *Clark v. Fry*, 8 Ohio St. 358; *Robinson v. Webb*, 11 Bush, 464, 477-480; *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77, 84.

⁸ *Robbins v. Chicago*, 4 Wall. 657, 2 Black, 418; *St. Paul Water Co. v. Ware*, 16 Wall. 566; *Whitney v. Clifford*, 46 Wis. 138; *Hole v. Sittingbourne & S. R. Co.*, 6 Hurl. & N. 488.

that a person who was employed to do a lawful act was employed to do it in a lawful manner, with due care and skill.¹ The company has been held liable for damages to an adjacent building, by the blasting of solid rock by contractors in the construction of their railroad, without any carelessness on their part, where in its contract with them it provided for the removal of solid rock by blasting.² It will be responsible for injuries occasioned by unlawful obstructions created by a contractor under the direction of the servants or officers of the company, and for its use and convenience;³ or where the work is done under its immediate superintendence, although, as between the parties, the relation may be that of employer and contractor.⁴

Effect of Reservations in the Contract. — Certain powers reserved to the employer are consistent with the relation of contractor and contractee. Thus, a power to direct the discharge of incompetent workmen,⁵ or to terminate the contract if the performance is unsatisfactory,⁶ or to supervise generally the work,⁷ or to give further directions which relate to the results of the work and not the manner of its performance,⁸ does not, where the employment is under a contract for the execution of a certain job or work, and the choice and direction of the servants still remain with the contractor, make the relation that of master and servant. Provisions inserted in the contract, making the contractor liable for injuries caused by his negligence, and allowing the company to withhold payments under the contract on account of them, do not affect the relation of the company to third parties and inure to their benefit.⁹

¹ *Butler v. Hunter*, 7 Hurl. & N. 826.

² *Carman v. Steubenville & I. R. Co.*, 4 Ohio St. 399.

³ *Phil. W., & B. R. Co. v. Phil. & H. Steam Towboat Co.*, 23 How. 209.

⁴ *Carman v. Steubenville & I. R. Co.*, 4 Ohio St. 399, 414, 415; *New Orleans, M., & C. R. Co. v. Hanning*, 15 Wall. 649; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; *Camp v. Church Wardens*, 7 La. An. 321; *Serandat v. Saisse*, L. R. 1 P. C. 152.

⁵ *Cuff v. Newark & N. Y. R. Co.*, 6 Vroom, 17; *Robinson v. Webb*, 11 Bush, 464; *Reedie v. London & N. W. R. Co.*, 4 Exch. 244; *Hobbit v. London & N. W. R. Co.*, 4 Exch. 254.

⁶ *Wray v. Evans*, 80 Pa. St. 102; *Schular v. Hudson River R. Co.*, 38 Barb. 653, 655.

⁷ *Eaton v. European & N. A. R. Co.*, 59 Me. 520, 533; *Barry v. St. Louis*, 17 Mo. 121. But see *New Orleans, M., & C. R. Co. v. Hanning*, 15 Wall. 649.

⁸ *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 432; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *Schular v. Hudson River R. Co.*, 38 Barb. 653; *Callahan v. Burlington & M. R. R. Co.*, 23 Iowa, 562.

⁹ *Tibbetts v. Knox & L. R. Co.*, 62 Me. 437. See *St. Paul Water Co. v. Ware*, 16 Wall. 566; *Blake v. Ferris*, 5 N. Y. 48.

Liability for the Exercise by the Contractor of the Delegated Power of Eminent Domain.—The rule, which exempts the company from liability for injuries done by a person acting under a contract with it and carrying on an independent employment, has sometimes been held not to apply where he is by delegation exercising the right of eminent domain conferred by the State, or doing some act under a power given by the charter which, but for such power, would be unlawful; and in such cases the company has been held liable for his acts. There are reasons of public policy for holding the company to a faithful execution of extraordinary powers conferred upon it, and not permitting it to transfer its responsibility; but this exception to the general rule should not be extended to tortious acts which were not committed in the execution of powers conferred by the charter.¹ The exception is also to be strictly limited to the exercise of extraordinary powers which the State confers in the exercise of the right of eminent domain. Thus, the company is not liable for injuries to persons carried by the contractor on his construction trains.²

Duties under Statutes not to be delegated.—A party cannot, by an act of his own, relieve himself of a duty imposed by law. He cannot discharge himself by shifting it upon another.³ This rule has been applied to municipal corporations, which, being bound to keep a highway safe for travel, are liable for the consequences of obstructions and defects caused by the immediate act of contractors.⁴ The duty is independent of the means by which the obstruction or defect was occasioned.⁵ The rule applies to public duties imposed by statute on railroad companies.⁶ Thus, if the

¹ *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365, 372; *Leshner v. Wabash Nav. Co.*, 14 Ill. 85; *Hinde v. Wabash Nav. Co.*, 15 Ill. 72; *Chicago, St. P., & F. R. Co. v. McCarthy*, 20 Ill. 385; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105; *West v. St. Louis, V., & T. H. R. Co.*, 63 Ill. 545; *Cairo & St. L. R. Co. v. Woosley*, 85 Ill. 370; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355, 360; *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77; *Cunningham v. International R. Co.*, 51 Tex. 503; *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Hilliard v. Richardson*, 3 Gray, 349, 362–366.

² *Cunningham v. International R. Co.*, 51 Tex. 503.

³ *Brackett v. Lubke*, 4 Allen, 138; *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77; *Pickard v. Smith*, 10 C. B. n. s. 470.

⁴ *Storrs v. Utica*, 17 N. Y. 104; *Robbins v. Chicago*, 2 Black, 418, 4 Wall. 657.

⁵ *Cuff v. Newark & N. Y. R. Co.*, 6 Vroom, 17, 25.

⁶ *Cuff v. Newark & N. Y. R. Co.*, 6 Vroom, 17, 24; *King v. New York Cent. & H. R. R. Co.*, 66 N. Y. 181, 185; *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178, 189; *McWilliams v. Detroit Cent. Mills Co.*, 31 Mich. 274; *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Chicago & R. I. R. Co. v. Whipple*, 22 Ill.

company is required to keep its track fenced, it is liable for injuries caused by its default, although at the time the road was in the hands of a lessee or contractor.¹

Nuisances created by a Contractor.—Where the relation is that of contractor and contractee, the fact that the injury to a third party is caused by some negligent or unlawful works of the contractor upon real estate does not make its owner liable unless the work itself is a nuisance.² But the land-owner has been held liable for the acts of the contractor where the works amount to a nuisance,³ or were such as from the ordinary course of things were likely to produce the injury.⁴ The company has been held liable for obstructions to navigation created by contractors, and remaining after it terminated the contract with them.⁵

Form of Action against the Company for the Torts of its Agents.—The company is liable in the same forms of action for the torts of its servants to which individuals are liable for the torts of their servants.⁶ An action of trespass lies against it where the servant's act is authorized or ratified,⁷ but case is the proper remedy where the gist of the action is his negligence.⁸ Trespass lies

105; *Cairo & St. L. R. Co. v. Woosley*, 85 Ill. 370; *Hole v. Sittingbourne & S. R. Co.*, 6 Hurl. & N. 488.

¹ *Gardner v. Smith*, 7 Mich. 410, 420; *Bay City & E. S. R. Co. v. Austin*, 21 Mich. 390; *Nelson v. Vt. & C. R. Co.*, 26 Vt. 717; *Clement v. Canfield*, 28 Vt. 302; *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77. But see *Blackwell v. Wiswall*, 24 Barb. 355; *Norton v. Wiswall*, 26 Barb. 618; *Blake v. Ferris*, 5 N. Y. 48.

² *Cuff v. Newark & N. Y. R. Co.*, 6 Vroom, 17; *Hilliard v. Richardson*, 3 Gray, 349; *Chambers v. Ohio Life Ins. & T. Co.*, 1 Disney, 327; *Painter v. Pittsburgh*, 46 Pa. St. 213, 222; *Blake v. Ferris*, 5 N. Y. 48, 61-65; *McCafferty v. Spuyten Duyvil & P. M. R. Co.*, 61 N. Y. 178; *King v. New York Cent. & H. R. R. Co.*, 66 N. Y. 181, 4 Hun, 769; *Robinson v. Webb*, 11 Bush, 464; *Ryan v. Curran*, 64 Ind. 345; *Reedie v. London & N. W. R. Co.*, 4 Exch. 244.

³ *Clark v. Fry*, 8 Ohio St. 358; *Robbins v. Chicago*, 2 Black, 418, 4 Wall. 657; *Deford v. Keyser*, 30 Md. 179; *New*

York v. Bailey, 2 Denio, 433, 445, 3 Hill, 531; *Vanderpool v. Husson*, 28 Barb. 196.

⁴ *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Angus v. Dalton*, L. R. 4 Q. B. Div. 162.

⁵ *Phil. W., & B. R. Co. v. Phil. & H. Steam Towboat Co.*, 23 How. 209, 5 Am. Law Reg. p. 280.

⁶ *State v. Morris & E. R. Co.*, 3 Zab. 360, 367; *Brokaw v. New Jersey R. & T. Co.*, 3 Vroom, 328.

⁷ *St. Louis, A., & C. R. Co. v. Dalby* 19 Ill. 353, 372; *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, 508; *Crocker v. New London, W., & P. R. Co.*, 24 Conn. 249, 266; *Eastern Counties R. Co. v. Broom*, 6 Exch. 314.

⁸ *Phil. G., & N. R. Co. v. Wilt*, 4 Whart. 143; *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 40, 53; *Illinois Cent. R. Co. v. Reedy*, 17 Ill. 580; *Brokaw v. New Jersey R. & T. Co.*, 3 Vroom, 328, 331; *Sharrod v. London & N. W. R. Co.*, 4 Exch. 580. See *Sabin v. Vt. Cent. R. Co.*, 25 Vt. 363, 371.

where his act was one of unjustifiable force, or was in itself unlawful;¹ but even then an action on the case may lie against the corporation.² These technical distinctions are disregarded in modern codes of practice.³

Actions for personal injuries are transitory, and may be brought for an injury committed in another State,⁴ or in a Territory;⁵ but jurisdiction will be taken as a matter of comity rather than of right, where not only the tort was committed, but the parties are resident in such other State.⁶ A foreign corporation committing torts in other States is liable therefor in such States upon the same principles as apply to domestic corporations.⁷

Although a child has recovered damages against a corporation for an injury, the parent may recover for the loss of service occasioned thereby.⁸ The corporation and its servant, by whose act the injury was done, may be joined in an action of tort in the nature of trespass.⁹

The defendant's negligence must be distinctly charged in the declaration.¹⁰

Evidence. Positive and Negative Testimony. — Positive testimony is allowed a greater weight in the law of evidence than negative testimony. Thus, the testimony of persons who gave, or saw, or heard signals given, is of superior value to that of persons who can only swear that they did not see or hear them.¹¹ The

¹ *St. Louis, A., & C. R. Co. v. Dalby*, 19 Ill. 353; *Chicago & N. W. R. Co. v. Peacock*, 48 Ill. 253; *Hewett v. Swift*, 3 Allen, 420. See *Emigh v. Pittsburg, Ft. W., & C. R. Co.*, 4 Biss. 114.

² *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69, 86.

³ *Hewett v. Swift*, 3 Allen, 420.

⁴ *Ackerson v. Erie R. Co.*, 2 Vroom, 309; *Northern Cent. R. Co. v. Scholl*, 16 Md. 331.

⁵ *Speer v. Mo., K., & T. R. Co.*, 23 Kan. 571. It was held in this case that there was no presumption that it is unlawful to run a railroad in the Indian Territory.

⁶ *Great Western R. Co. v. Miller*, 19 Mich. 305.

⁷ *Austin v. New York & E. R. Co.*, 1 Dutcher, 381; *People v. Central R.*, 48 Barb. 478.

⁸ *Wilton v. Middlesex R. Co.*, 125 Mass. 130, 107 Mass. 108.

⁹ *Moore v. Fitchburg R. Co.*, 4 Gray,

465; *Hewett v. Swift*, 3 Allen, 420; *Holmes v. Wakefield*, 12 Allen, 580; *Brokaw v. New Jersey R. & T. Co.*, 3 Vroom, 328.

¹⁰ *Lawler v. Androscoggin R. Co.*, 62 Me. 463; *Hayden v. Smithville Man. Co.*, 29 Conn. 548; *Hildebrand v. Toledo, W., & W. R. Co.*, 47 Ind. 399.

¹¹ *Chicago & R. I. R. Co. v. Still*, 19 Ill. 499; *Chicago, B., & Q. R. Co. v. Stumps*, 55 Ill. 367; *Chicago & A. R. Co. v. Jacobs*, 63 Ill. 178; *Chicago, B., & Q. R. Co. v. Lee*, 68 Ill. 576, 582, 60 Ill. 501; *Rockford, R. I., & St. L. R. Co. v. Byam*, 80 Ill. 528; *Pittsburg, Ft. W., & C. R. Co. v. Karns*, 18 Ind. 87; *Culhane v. New York Cent. & H. R. Co.*, 60 N. Y. 133, 67 Barb. 562; *Chapman v. New York Cent. & H. R. R. Co.*, 14 Hun, 484; *Sutherland v. New York Cent. & H. R. R. Co.*, 41 N. Y. Superior, 17. See *Dublin, W., & W. R. Co. v. Slattery*, L. R. 3 App Cas. 1155, 1164.

rule loses much of its force where the latter had an opportunity to know if they were given, and gave attention.¹ To compare and weigh testimony and pass upon the credibility of witnesses is, however, a peculiar function of the jury, who may, for good reason, credit the negative and reject the positive testimony.² If they disregard the rule under circumstances where plainly it ought to be heeded, the court will set aside the verdict.³

A Default at one Time or Place not proved by a Default at another Time or Place.—One act of negligence or breach of duty is not competent evidence of another.⁴ Thus, to prove that the railroad was defective at a particular place, or that signals were not given on a particular occasion, it is not competent to show that the road was defective at another place;⁵ or that the signals were omitted on another occasion;⁶ or that an injury occurred at another time at the same place under similar circumstances.⁷ On the other hand, proof of care on the part of the defendant at other times will not be admitted to prove care on the occasion of the injury.⁸ But where a horse was frightened by the alleged careless use of a whistle, evidence was admitted that other horses had been frightened by it at the same place.⁹ Previous hard use of the track, even at other places, is under some circumstances admissible, as tending to show the condition of the track and machinery at the time and place of the injury.¹⁰

¹ Chicago, B., & Q. R. Co. v. Cauffman, 38 Ill. 424; Rockford, R. I., & St. L. R. Co. v. Hillmer, 72 Ill. 235; Renwick v. New York Cent. R. Co., 36 N. Y. 132; Voak v. Northern Cent. R. Co., 75 N. Y. 320; Urbanek v. Chicago, M., & St. P. R. Co., 47 Wis. 59.

² Chicago, B., & Q. R. Co. v. Triplett, 38 Ill. 482; Chicago & R. I. R. Co. v. McKean, 40 Ill. 218; Peoria, P., & J. R. Co. v. Siltman, 88 Ill. 529; Dyer v. Erie R. Co., 71 N. Y. 228, 237; Cosgrove v. New York Cent. & H. R. R. Co., 13 Hun, 329; Byrne v. New York Cent. & H. R. R. Co., 14 Hun, 322; Salter v. Utica & B. R. Co., 59 N. Y. 631; Eilert v. Green Bay, &c. R. Co., 10 Cent. L. J. 316.

³ Chicago & A. R. Co. v. Gretzner, 46 Ill. 74; St. Louis, A., & T. H. R. Co. v. Manly, 58 Ill. 300; Seibert v. Erie R. Co., 49 Barb. 583.

⁴ Robinson v. Fitchburg & W. R. Co.,

7 Gray, 92; Gahagan v. Boston & L. R. Co., 1 Allen, 187; Parker v. Portland Publishing Co., 69 Me. 173; Chicago & A. R. Co. v. Shannon, 43 Ill. 338.

⁵ Louisville & N. R. Co. v. Fox, 11 Bush, 495; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537. *Contra*, Murphy v. New York Cent. R. Co., 66 Barb. 125.

⁶ Chicago, B., & Q. R. Co. v. Lee, 60 Ill. 501, 68 Ill. 576. *Contra*, State v. Manchester & L. R. Co., 52 N. H. 528, 549; Hall v. Brown, 58 N. H. 93, 54 N. H. 495.

⁷ Davis v. Oregon & C. R. Co., 8 Oreg. 172.

⁸ Gahagan v. Boston & L. R. Co., 1 Allen, 187.

⁹ Hill v. Portland & R. R. Co., 55 Me. 438. See Eggleston v. Columbia Turnp. Road, 18 Hun, 146.

¹⁰ Holyoke v. Grand Trunk R. Co., 48 N. H. 511.

Additional Precautions. — Additional precautions and safeguards taken by the company after an injury are not admissible to show its negligence.¹ Its offer to pay the funeral expenses of a person killed by its engines is not evidence in an action against it.²

Statements of the Company's Servants. — The declarations and admissions of the company's servants are admissible only when a part of the *res gestæ*. Although made on the day, or at a short distance from the scene, of the injury, the nearness in time and place do not qualify them if they are not a part of the same transaction. This rule is often applied to exclude statements of the circumstances of the injury given by the servant by whose alleged negligence it was caused.³

Photographs and Telegrams. — A photograph of the scene of the injury and of the condition of things after it took place has been admitted as evidence with oral proof that it was a correct representation.⁴

Telegraphic correspondence between the servants of the company just before the injury has been admitted as a part of the

¹ *Dougan v. Lake Champlain Trans. Co.*, 56 N. Y. 1; *Dale v. Del. L. & W. R. Co.*, 78 N. Y. 468; *Salters v. Delaware & H. C. Co.*, 3 Hun, 338; *Payne v. Troy & B. R. Co.*, 9 Hun, 526. But see *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311; *Westfall v. Erie R. Co.*, 5 Hun, 75; *Harvey v. New York Cent. & H. R. R. Co.*, 19 Hun, 556; *Brehm v. Great Western R. Co.*, 34 Barb. 256, 276; *Kansas Pacific R. Co. v. Miller*, 2 Col. 442, 468; *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47.

² *Campbell v. Chicago, R. L. & P. R. Co.*, 45 Iowa, 76.

³ *Robinson v. Fitchburg & W. R. Co.*, 7 Gray, 92; *Luby v. Hudson River R. Co.*, 17 N. Y. 131; *Anderson v. Rome, W., & O. R. Co.*, 54 N. Y. 334; *Furst v. Second Av. R. Co.*, 72 N. Y. 542; *Brehm v. Great Western R. Co.*, 34 Barb. 256; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Penn. R. Co. v. Books*, 57 Pa. St. 339; *Mullan v. Phil. & S. M. S. Co.*, 78 Pa. St. 25; *Bigley v. Williams*, 80 Pa. St. 107; *Huntingdon & B. T. M. R. & Coal Co. v. Decker*, 82 Pa. St. 119, 84 Pa. St. 419; *Parker v. Allegheny Valley R. Co.*, 10 Reporter, 672; *Ashmore v. Penn. Steam Tow-*

ing & T. Co., 9 Vroom, 13; *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 265; *Chicago, B., & Q. R. Co. v. Riddle*, 60 Ill. 534; *Chicago, B., & Q. R. Co. v. Lee*, 60 Ill. 501; *Ohio & M. R. Co. v. Porter*, 92 Ill. 437; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Kansas Pacific R. Co. v. Pointer*, 9 Kan. 620; *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489; *Sims v. Macon & W. R. Co.*, 28 Ga. 93; *Gerke v. Cal. Steam Nav. Co.*, 9 Cal. 251; *Virginia & T. R. Co. v. Sayers*, 26 Gratt. 328; *Coyle v. Balt. & O. R. Co.*, 11 W. Va. 94; *Hawker v. Balt. & O. R. Co.*, 15 W. Va. 628; *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621; *Thompson v. Androsoggin R. I. Co.*, 58 N. H. 108, 54 N. H. 545. See *Malacek v. Tower Grove & L. R. Co.*, 57 Mo. 17. The same rule applies to the declarations of the plaintiff's servants. *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185. The declarations of the husband are not admissible against the wife, when made in her absence, in a suit brought by her. *Shaw v. Boston & W. R. Co.*, 8 Gray, 45.

⁴ *Locke v. Sioux City & P. R. Co.*, 46 Iowa, 109. See *Hollenbeck v. Rowley*, 8 Allen, 473.

res gestæ in a suit against the company by another servant whose injury was caused by its alleged negligence.¹

Description of the Place of Injury. Previous Warning. — Evidence descriptive of the place where the injury occurred is competent; and evidence of what occurred immediately after may be admitted when a part of the *res gestæ*.² Evidence that the injured person had been previously warned not to go upon the tracks is admissible against him on the question whether he was using due care at the time of the injury.³

Drunkenness when Proof of Negligence. — The intoxication of a servant of the company, by whose alleged negligence the injury occurred, is admissible as evidence when he was in that condition at the time of the injury; but it is only important when it was the cause of the injury, and it is for the jury to say whether it was the cause.⁴ But his intoxication at other times is not admissible.⁵ A habit of intoxication in the servant has been held to raise a presumption of his negligence.⁶

The intoxication of the injured person may contribute to the injury, by leading him to place himself in an exposed position or preventing the full use of his faculties, and may be put in evidence to prove negligence on his part; but unless it contributes to the injury, it will not affect his right of action.⁷

General Character of a Servant. — The carelessness of a person cannot be proved by common repute.⁸ Whether the general habits

¹ *Deverson v. Eastern R. Co.*, 58 N. H. 129.

² *Casey v. New York Cent. & H. R. Co.*, 78 N. Y. 518, 6 Abbott N. C. 104, 8 Daly, 220.

³ *Fitzpatrick v. Fitchburg R. Co.*, 128 Mass. 13.

⁴ *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 5 Hun, 165, 67 N. Y. 425; *Phil. City Pass. R. Co. v. Henrice*, 37 Leg. Int. 135, 9 Reporter, 689.

⁵ *Warner v. New York Cent. R. Co.*, 44 N. Y. 465; *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44.

⁶ *Penn. R. Co. v. Books*, 57 Pa. St. 339; *Huntingdon & B. T. M. R. Coal Co. v. Decker*, 84 Pa. St. 419, 424, 82 Pa. St. 119.

⁷ *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Alger v. Lowell*, 3 Allen, 402;

Illinois Cent. R. Co. v. Hutchinson, 47 Ill. 408; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177; *Chicago City R. Co. v. Lewis*, 5 Brad. (Ill.) 242; *Meyer v. Pacific R. Co.*, 40 Mo. 151; *Whalen v. St. Louis, K. C., & N. R. Co.*, 60 Mo. 323; *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Healey v. New York*, 3 Hun, 708; *Bradley v. Second Av. R. Co.*, 8 Daly, 289; *Davis v. Oregon & C. R. Co.*, 8 Oreg. 172; *Robinson v. Pioche*, 5 Cal. 460; *O'Keefe v. Chicago, R. I., & P. R. Co.*, 32 Iowa, 467; *Cramer v. Burlington*, 42 Iowa, 315; *Baltimore & O. R. Co. v. Boteler*, 38 Md. 568; *Marquette, H., & O. R. Co. v. Handford*, 39 Mich. 537; *Southwestern R. Co. v. Hankerson*, 61 Ga. 114.

⁸ *Baldwin v. Western R. Co.*, 4 Gray, 333.

and character of the servant by whose alleged negligence the injury occurred may be proved is doubtful.¹ They have been admitted in evidence as bearing upon a claim for exemplary damages.² A servant's want of skill is material only when it contributes to the injury.³ It is not competent to show in an action against the company that its employees are overworked in order to prove that a particular employee was by excessive labor incapacitated from performing his duty.⁴

Opinions of Experts.—The opinions of experts are competent evidence on questions of science and professional skill, but not on matters of common experience, which are equally within the knowledge of the jury or unskilled persons,⁵ or on the ultimate fact to be found by the jury.⁶ They have been rejected on the questions whether a train stopped long enough to give passengers time to alight;⁷ whether a company employed a sufficient number of brakemen;⁸ whether the blowing of a whistle was safe and prudent with reference to travel on a highway;⁹ and what is the custom of other companies.¹⁰ They have, however, been admitted as to the capacity of an engine;¹¹ the place at which a running train would come to a stop;¹² what rate of speed was under the circumstances safe;¹³ what is the proper station for

¹ See *Robinson v. Fitchburg & W. R. Co.*, 7 Gray, 92; *Gahagan v. Boston & L. R. Co.*, 1 Allen, 187; *Penn. R. Co. v. Books*, 57 Pa. St. 339; *Mansfield Coal & C. Co. v. McEnery*, 37 Leg. Int. 28.

² *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44.

³ *Culhane v. New York Cent. & H. R. Co.*, 60 N. Y., 133. See *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; *Haskin v. New York Cent. & H. R. R. Co.*, 65 Barb. 129.

⁴ *Phil. City Pass. R. Co. v. Henrice*, 37 Leg. Int. 135, 9 Reporter, 689.

⁵ *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa, 31; *Muldowney v. Ill. Cent. R. Co.*, 36 Iowa, 462, 39 Iowa, 615; *Way v. Ill. Cent. R. Co.*, 40 Iowa, 341; *Belair v. Chicago & N. W. R. Co.*, 43 Iowa, 662; *Kline v. Kansas City, St. J., & C. B. R. Co.*, 50 Iowa, 656; *White v. Ballou*, 8 Allen, 408; *Higgins v. Dewey*, 107 Mass. 494; *Simmons v. New Bedford, V., & N. S. Co.*, 97 Mass. 361, 100 Mass. 34; *Milwaukie & St. P. R. Co. v. Kellogg*, 94

U. S. 469, 472; *Koons v. St. Louis & I. M. R. Co.*, 65 Mo. 592; *Macon & W. R. Co. v. Johnson*, 38 Ga. 409, 435; *Toledo, P., & W. R. Co. v. Conroy*, 68 Ill. 560, 61 Ill. 162.

⁶ *Muldowney v. Ill. Cent. R. Co.*, 39 Iowa, 615, 36 Iowa, 462.

⁷ *Keller v. New York Cent. R. Co.*, 2 Abbott Ct. App. 480.

⁸ *Harvey v. New York Cent. & H. R. R. Co.*, 19 Hun, 556, 559.

⁹ *Hill v. Portland & R. R. Co.*, 55 Me. 438.

¹⁰ *Koons v. St. Louis & I. M. R. Co.*, 65 Mo. 592; *Hill v. Portland & R. R. Co.*, 55 Me. 438; *Bailey v. New Haven & N. R. Co.*, 107 Mass. 496. But see *Quimby v. Vt. Cent. R. Co.*, 23 Vt. 387; *Illinois Cent. R. Co. v. Reedy*, 17 Ill. 580.

¹¹ *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489.

¹² *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.

¹³ *Cooper v. Central R. Co.*, 44 Iowa, 134.

brakemen on a train;¹ whether in view of the distance at which cattle or persons were seen on the track the engine could have been stopped in time to prevent a collision;² what threw a car from the track;³ and the advantages and dangers of machinery constructed in a particular way.⁴

Witnesses who are not experts, but who are qualified by their means and habits of observation to judge, may testify as to the speed of a passing train.⁵

It is not competent to interrogate an expert as to an hypothesis where there are no facts in the case tending to support it.⁶

Opinions of Physicians. — Opinions of physicians based on personal examination or on facts proved by witnesses are admitted to show the nature of the disease or disability resulting from the injury, and its probable duration and curability;⁷ but to make them competent, they must be the result of a careful and complete examination.⁸ The maimed limb may be exhibited in the presence of the jury to the surgeon who is called to describe the injury.⁹

Opinions as to Amount of Damages. — Opinions of witnesses are not admissible as to the amount of damages for a personal injury.¹⁰

Life-tables. — In actions for injuries not resulting in death, life-tables are not competent evidence of the probable injury.¹¹

Statements of the Injured Person. — The declarations of the injured person are, under certain limitations, competent evidence

¹ Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 227.

² Bellefontaine & I. R. Co. v. Bailey, 11 Ohio St. 333; Richmond & D. R. Co. v. Anderson, 31 Gratt. 812.

³ Seaver v. Boston & M. R., 14 Gray, 466.

⁴ Baldwin v. Chicago, R. I., & P. R. Co., 50 Iowa, 680.

⁵ Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

⁶ Hurst v. Chicago, R. I., & P. R. Co., 49 Iowa, 76; Muldowney v. Ill. Cent. R. Co., 39 Iowa, 616, 36 Iowa, 462.

⁷ Matteson v. New York Cent. R. Co.,

35 N. Y. 487; Lincoln v. Saratoga & S. R. Co., 23 Wend. 425; Grand Rapids & I. R. Co. v. Martin, 41 Mich. 667; Kansas P. R. Co. v. Pointer, 9 Kan. 620.

⁸ Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

⁹ Mulhado v. Brooklyn City R. Co., 30 N. Y. 370.

¹⁰ Lincoln v. Saratoga & S. R. Co., 23 Wend. 425; Central R. & B. Co. v. Kelly, 58 Ga. 107; Hastings v. Steamer Uncle Sam, 10 Cal. 341.

¹¹ Nelson v. Chicago, R. I., & P. R. Co., 38 Iowa, 564. See Simonson v. Chicago, R. I., & P. R. Co., 49 Iowa, 87.

of the nature and effect of the injury. Thus, his complaints and exclamations made at the time it occurred, expressive of pain and indicating its seat and character, but not being in the nature of a narration or statement, are admitted. They are, when made at any time during the disability, received when expressive of present pain or malady.¹ Such declarations, sometimes called "verbal facts," are not required to be strictly contemporaneous with the event, but, though subsequent in time, may, by connecting circumstances, be made a part of the *res gestæ*.² The injured person's subsequent statements of his ailments and symptoms, made even after the commencement of the suit, to his physician for the purpose of treatment, are received, even though narrative in form.³ They are admitted only when made in the course of treatment, and are excluded when made at an examination conducted for the purpose of obtaining testimony.⁴ Statements of the injured person as to the manner of the injury, made with the consciousness of impending death, are not admitted in civil cases.⁵

Examination of Plaintiff's Wound. — The plaintiff who claims damages for a personal injury may be required by the court, on the defendant's application, to submit his person to be examined by experts.⁶

Burden of Proof of Defendant's Negligence. — The burden of proof is on the plaintiff to show that the defendant was negligent, and that his negligence caused the injury.⁷

Burden of Proof of Plaintiff's Care. — The burden of proof is on the plaintiff to show that he was himself in the exercise of rea-

¹ Bacon v. Charlton, 7 Cush. 581; Waldele v. New York Cent. & H. R. R. Co., 19 Hun, 69.

² Travellers' Ins. Co. v. Mosley, 8 Wall. 397; Wery v. Persons, 28 N. Y. 344; Matteson v. New York Cent. R. Co., 35 N. Y. 487.

³ Barber v. Merriam, 11 Allen, 322; Fay v. Harlan, 128 Mass. 244; Matteson v. New York Cent. R. Co., 35 N. Y. 487; Murphy v. New York Cent. R. Co., 66 Barb. 125. But see Illinois Cent. R. Co. v. Sutton, 42 Ill. 438.

⁴ Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

⁵ Marshall v. Chicago & G. E. R. Co.,

48 Ill. 475; Chicago & N. W. R. Co. v. Howard, 6 Brad. (Ill.) 569.

⁶ Schroeder v. Chicago, R. I., & P. R. Co., 47 Iowa, 375, 41 Iowa, 344.

⁷ Button v. Hudson River R. Co., 18 N. Y. 248, 251; Deyo v. New York Cent. R. Co., 34 N. Y. 9; Baltimore & O. R. Co. v. Bahrs, 28 Md. 647; Freck v. Phil., W., & B. R. Co., 39 Md. 574; State v. Phil., W., & B. R. Co., 47 Md. 76; Penn. R. Co. v. Goodman, 62 Pa. St. 329; Robinson v. Fitchburg & W. R. Co., 7 Gray, 92; Shaw v. Boston & W. R. Co., 8 Gray, 45, 79; Chicago, B., & Q. R. Co. v. Harwood, 90 Ill. 425.

sonable care, or that his negligence did not contribute to the injury. This is an essential element in his case, and is to be shown affirmatively.¹ The rule applies where the action is prosecuted by the personal representatives, or by relatives, under statutes.²

The plaintiff's exercise of ordinary or reasonable care may be shown by circumstantial as well as by direct proof; and usually he is not required in proving his case to call witnesses to negative acts of negligence on his part. If he is without fault, the fact will naturally appear from the proof which he introduces to show that the defendant's negligence caused the injury. His exercise of due care must, however, where the testimony is conflicting, appear by a preponderance of evidence; and the evidence must be such as to authorize the jury to find affirmatively that his negligence did not contribute to it.³ His exercise of due care may be inferred, under some circumstances, from the ordinary habits and dispositions of prudent men, and the instinct of self-preservation.⁴ If the plaintiff's evidence, which is given to show

¹ *Lane v. Crombie*, 12 Pick. 177; *Lucas v. New Bedford & T. R. Co.*, 6 Gray, 64; *Robinson v. Fitchburg & W. R. Co.*, 7 Gray, 92; *Gahagan v. Boston & L. R. Co.*, 1 Allen, 187; *Warren v. Fitchburg R. Co.*, 8 Allen, 227, 230; *Butterfield v. Western R. Co.*, 10 Allen, 532; *Hickey v. Boston & L. R. Co.*, 14 Allen, 429; *Murphy v. Deane*, 101 Mass. 455; *Allyn v. Boston & A. R. Co.*, 105 Mass. 77; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9; *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 248; *Chamberlain v. Mil. & M. R. Co.*, 7 Wis. 425, 431; *Greenleaf v. Ill. Cent. R. Co.*, 29 Iowa, 14; *Carlin v. Chicago, R. I., & P. R. Co.*, 37 Iowa, 316; *Nelson v. Chicago, R. I., & P. R. Co.*, 38 Iowa, 564; *Benton v. Central R. Co.*, 42 Iowa, 192; *Lang v. Holiday Creek, R., & C. M. Co.*, 49 Iowa, 469; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Le Baron v. Joslin*, 41 Mich. 313; *Chicago City R. Co. v. Lewis*, 5 Brad. (Ill.) 242; *Chicago, B., & Q. R. Co. v. Damerell*, 81 Ill. 450; *Indianapolis & St. L. R. Co. v. Evans*, 88 Ill. 63. See 5 Am. Law Rev. (Jan. 1871), p. 205.

² *Patterson v. Burlington & M. R. Co.* 38 Iowa, 279; *Murphy v. Chicago, R. I.,*

& P. R. Co., 45 Iowa, 661, 38 Iowa, 539; *Schappert v. Ringler*, 45 N. Y. Superior, 345.

³ *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 5 Duer, 21; *Warner v. New York Cent. R. Co.*, 44 N. Y. 465, 471; *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 248, 2 Thomp. & C. 644; *Massoth v. Del. & H. C. Co.*, 64 N. Y. 524; *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417; *Mahar v. Grand Trunk R. Co.*, 19 Hun, 32; *Detroit & M. R. Co. v. Steinburg*, 17 Mich. 99, 119; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 282, 283; *Commonwealth v. Boston & L. R. Co.*, 126 Mass. 61; *Cleveland & P. R. Co. v. Rowan*, 66 Pa. St. 393; *Nelson v. Chicago, R. I., & P. R. Co.*, 38 Iowa, 564; *Murphy v. Chicago, R. I., & P. R. Co.*, 45 Iowa, 661; *Starry v. Dubuque & S. W. R. Co.*, 51 Iowa, 419.

⁴ *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 5 Duer, 21; *Northern Cent. R. Co. v. State*, 29 Md. 420, 438; *Northern Cent. R. Co. v. State*, 31 Md. 357; *Cleveland & P. R. Co. v. Rowan*, 66 Pa. St. 393; *Weiss v. Penn. R. Co.*, 79 Pa. St. 387. But see *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 248, 252.

the defendant's negligence, discloses fully the facts and raises no inference of the plaintiff's negligence, the jury are justified in finding that the plaintiff exercised due care.¹

The rule that the burden of proof is on the plaintiff to prove his exercise of due care is denied in several jurisdictions, where it is held to be defensive matter which the defendant is to prove, when not appearing by the plaintiff's own evidence.² The rule is, as already seen, so easily satisfied that ordinarily no more is required of the plaintiff within the jurisdictions which accept it than in those which reject it.

Proof of an injury where the plaintiff and defendant are not in any relation arising from contract, or where the relation is that of master and servant, is not *prima facie* evidence of the defendant's negligence. Thus, proof of an injury arising from a collision between the train of a company and a traveller at a highway crossing does not raise a presumption of the former's negligence.³ Proof of injury to a passenger is not in itself *prima facie* evidence of the carrier's negligence, but it may be such with attending circumstances.⁴

Damages for Personal Injuries one Cause of Action. — A personal injury is one cause of action, and all damages for the injury, past

¹ *Milwaukie & C. R. Co. v. Hunter*, 11 Wis. 160; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257.

² *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401; *Freck v. Phil. W., & B. R. Co.*, 39 Md. 574; *Paducah & M. R. Co., v. Hoehl*, 12 Bush, 41; *Hocum v. Weitherrick*, 22 Minn. 152; *Whittier v. Chicago, M., & St. P. R. Co.*, 24 Minn. 394; *Robinson v. Western Pacific R. Co.*, 48 Cal. 409; *New Jersey Express Co. v. Nichols*, 4 Vroom, 434; *Johnson v. Hudson River R. Co.*, 5 Duer, 21, 20 N. Y. 65; *Hackford v. New York Cent. & H. R. R. Co.*, 43 How. Pr. 222, 53 N. Y. 654; *Robinson v. New York Cent. & H. R. R. Co.*, 65 Barb. 146; *Kansas Pacific R. Co. v. Twombly*, 3 Col. 125; *Central Branch Union P. R. Co. v. Hotham*, 22 Kan. 41; *Penn. Canal Co. v. Bentley*, 66 Pa. St. 30; *Penn. R. Co. v. Weber*, 76 Pa. St. 157; *Weiss v. Penn. R. Co.*, 79 Pa. St. 387; *Penn. R. Co. v. Werner*, 89 Pa. St. 59; *Richey v. Mo. Pacific R. Co.*, 7 Mo. App. 150; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627, 24 Ohio St. 642.

³ *Shaw v. Boston & W. R. Co.*, 8 Gray, 45, 79; *Commonwealth v. Boston & W. R. Co.*, 101 Mass. 201; *Curran v. Warren C. & M. Co.*, 36 N. Y. 153; *Penn. R. Co. v. McTighe*, 46 Pa. St. 316; *Penn. R. Co. v. Goodman*, 62 Pa. St. 329; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177, 182; *Chicago City R. Co. v. Lewis*, 5 Brad. (Ill.) 242; *Schultz v. Pacific R. Co.*, 36 Mo. 13; *Elliott v. St. Louis & I. M. R. Co.*, 67 Mo. 272; *Williams v. Great Western R. Co.*, L. R. 9 Ex. 157. *Contra*, *Horne v. Memphis & O. R. Co.*, 1 Cold. (Tenn.) 72; *Louisville & N. R. Co. v. Connor*, 9 Heisk. 19; *Illinois Cent. R. Co. v. Phillips*, 55 Ill. 194, 49 Ill. 234.

⁴ *Holbrook v. Utica & S. R. Co.*, 12 N. Y. 236; *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431; *Pittsburg, C., & St. L. R. Co. v. Thompson*, 56 Ill. 138; *Schultz v. Pacific R. Co.*, 36 Mo. 13, 25, 30. But see *Daniel v. Metropolitan R. Co.*, L. R. 5 H. L. 45, L. R. 3 C. P. 216, 222, 591.

and prospective, are recoverable in one action, which will be a bar to any other.¹

What is to be included in the Damages.—The damages for personal injuries include, and are limited to, the natural and immediate consequences of the wrongful act.² They include, irrespective of the defendant's motive or conduct at the time of the injury: 1. Expenses of surgical and medical attendance and nursing. 2. Bodily pain, according to its degree and probable duration. 3. Bodily injury, taking into account loss of time, the extent and probable duration of the injury, its effect on the health, the mental and physical powers, the capacity for labor, the pursuit of an occupation, and the earning of money. To these may be added, where the tortious act is accompanied by malice, insult, or inhumanity, compensation for wounded feelings.³

¹ *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9; *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541; *Curtis v. Rochester & S. R. Co.*, 20 Barb. 282, 18 N. Y. 534; *Spicer v. Chicago & N. W. R. Co.*, 29 Wis. 580; *Elkhart v. Ritter*, 66 Ind. 136; *South & N. A. R. Co. v. McLendon*, 10 Reporter, 688.

² *Ballou v. Farnum*, 11 Allen, 73, 75; *Baltimore & O. R. Co. v. Blocher*, 27 Md. 277; *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210; *Indianapolis, B., & W. R. Co. v. Birney*, 71 Ill. 391.

³ *Ransom v. New York & E. R. Co.*, 15 N. Y. 415; *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534, 20 Barb. 282; *Drew v. Sixth Av. R. Co.*, 26 N. Y. 49; *Murray v. Hudson River R. Co.*, 47 Barb. 196; *Laing v. Colder*, 8 Pa. St. 479; *Penn. R. Co. v. Books*, 57 Pa. St. 339; *Penn. & O. C. Co. v. Graham*, 63 Pa. St. 290; *Pittsburg, A., & M. Pass. R. Co. v. Donahue*, 70 Pa. St. 119; *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317; *Bannon v. Balt. & O. R. Co.*, 24 Md. 108; *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329; *McMahon v. Northern Cent. R. Co.*, 39 Md. 438; *Klein v. Jewett*, 11 C. E. Green, 474, 12 C. E. Green, 550; *Hagan v. Providence & W. R. Co.*, 3 R. I. 88; *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9; *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541; *Ballou v. Farnum*, 11 Allen, 73; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235; *Chicago, B., & Q. R. Co. v. Hazzard*, 26 Ill. 373,

388; *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 364; *Pierce v. Millay*, 44 Ill. 189; *Russ v. Steamboat War Eagle*, 14 Iowa, 363; *Muldowney v. Ill. Cent. R. Co.*, 36 Iowa, 462; *Morris v. Chicago, B., & Q. R. Co.*, 45 Iowa, 29; *Smith v. Pittsburg, Ft. W., & C. R. Co.*, 23 Ohio St. 10; *South & N. A. R. Co. v. McLendon*, 10 Reporter, 688; *Hill v. New Orleans, O., & G. W. R. Co.*, 11 La. An. 292; *Choppin v. New Orleans & C. R. Co.*, 17 La. An. 19; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350; *Cohen v. Eureka & P. R. Co.*, 14 Nev. 376; *Malone v. Hawley*, 46 Cal. 409; *Bradshaw v. Lancashire & Y. R. Co.*, L. R. 10 C. P. 189; *Phillips v. South Western R. Co.*, L. R. 4 Q. B. Div. 406, L. R. 5 Q. B. Div. 78, L. R. 5 C. P. Div. 280. In *Phillips v. South Western R. Co.*, L. R. 4 Q. B. Div. 406, 407, *Cockburn, C. J.*, said: "It is extremely difficult to lay down any precise rule as to the measure of damages in cases of personal injury like the present. No doubt, as a general rule, where injury is caused to one person by the wrongful or negligent act of another, the compensation should be commensurate to the injury sustained. But there are personal injuries for which no amount of pecuniary damages would afford adequate compensation, while, on the other hand, the attempt to award full compensation in damages might be attended with ruinous consequences to defendants who cannot always, even by the utmost care, protect

Mental is not readily distinguished from physical suffering.¹ Pain of mind, when connected with bodily injury, is the subject of damages;² but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity.³ Thus, a sense of mortification on account of a deformity, resulting from the injury, should be considered, while wounded "pride and manhood" should be excluded.⁴

The plaintiff's occupation, — the kind of labor or business in which he has been engaged, — and the mental and physical incapacity to carry it on resulting from the injury, are competent evidence to determine the compensation to which he is entitled.⁵

themselves against carelessness of persons in their employ. Generally speaking, we agree with the rule as laid down by Brett, J., in *Rowley v. London & North Western Ry. Co.* (Law Rep. 8 Ex. 231), an action brought on the 9 & 10 Vict. c. 93, that a jury in these cases must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but 'must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation.' . . . But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration, as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business, as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life." Affirmed in the Court of Appeal, L. R. 5 Q. B. Div. 78. After a new trial, L. R. 5 C. P. Div. 280, 287, Bramwell, L. J., said: "I have tried as judge more than a hundred actions of this kind, and the direction which I, in common with other judges, have been accustomed to give the jury has been to

the following effect: 'You must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering; of course it is almost impossible for you to give to an injured man what can be strictly called compensation, but you must take a reasonable view of the case, and must consider, under all the circumstances, what is a fair amount to be awarded to him.' I have never known a direction in that form to be questioned."

¹ *Ballou v. Farnum*, 11 Allen, 73, 77.

² *Smith v. Pittsburg, Ft. W., & C. R. Co.*, 23 Ohio St. 10.

³ *Illinois Cent. R. Co. v. Sutton*, 53 Ill. 397; *Indianap. & St. L. R. Co. v. Stables*, 62 Ill. 313, 320; *Johnson v. Wells*, 6 Nev. 224; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350, 369.

⁴ *Atlantic & R. A. L. R. Co. v. Wood*, 48 Ga. 565.

⁵ *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, 29 N. Y. 252; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9; *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. 425; *Ballou v. Farnham*, 11 Allen, 73; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Bannon v. Balt. & O. R. Co.*, 24 Md. 108; *Baltimore & O. R. Co. v. Shipley*, 31 Md. 368; *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa, 363; *Wade v. Leroy*, 20 How. 34; *Nebraska City v. Campbell*, 2 Black, 590; *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667; *Kinney v. Crocker*, 18 Wis. 74; *Elkhart v. Ritter*, 66 Ind. 136. But see *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541. As to the necessity of an allegation of injury to one's profession, see

The past earnings of a person employed on fixed wages,¹ and the earnings of a professional man,² have been admitted in evidence to determine the amount of the personal injury. The general profits of a commercial business have been generally excluded as too uncertain.³ The evidence of the kind and amount of business and of the profits should be received, if at all, not as furnishing the measure of damages, but for the purpose of guiding the discretion of the jury.⁴

Among circumstances too remote or uncertain, or otherwise inadmissible in computing the damages for personal injuries, are the following: The plaintiff's habits of industry and economy, wealth or poverty, peculiar skill in his occupation, or the number of his dependents;⁵ an injury, though fatal, to the plaintiff's husband at the same time;⁶ the loss of a position to which, but for the injury, he would have been appointed;⁷ and, except in cases admitting vindictive damages, the defendant's wealth⁸ or the plaintiff's counsel fees.⁹

Laing v. Colder, 8 Pa. St. 479; *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9; *Baldwin v. Western R. Co.*, 4 Gray, 333; *Tomlinson v. Derby*, 43 Conn. 562.

¹ *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Masterton v. Mt. Vernon*, 58 N. Y. 391, 395; *Grant v. Brooklyn*, 41 Barb. 381; *Simonson v. Chicago, R. I., & P. R. Co.*, 49 Iowa, 87; *Kline v. Kansas City, St. J., & C. B. R. Co.*, 50 Iowa, 656.

² *Penn. R. Co. v. Dale*, 76 Pa. St. 47; *Walker v. Erie R. Co.*, 63 Barb. 260; *New Jersey Ex. Co. v. Nichols*, 4 Vroom, 434, 3 Vroom, 166; *Metcalf v. Baker*, 57 N. Y. 662; *Nash v. Sharpe*, 19 Hun, 365. But see *Masterton v. Mt. Vernon*, 58 N. Y. 391, 396. The rule admitting the consideration of the plaintiff's professional income in assessing his damages, which is open to serious question on grounds of policy and justice, has led, in England, to an extraordinary "respect of persons." A verdict of £7,000 in favor of a physician whose income was £5,000 a year was set aside as inadequate, and a second verdict for £16,000 was sustained. *Phillips v. South Western R. Co.*, L. R. 4 Q. B. Div. 406, L. R. 5 Q. B. Div. 78, L. R. 5 C. P. Div. 280.

³ *Masterton v. Mt. Vernon*, 58 N. Y.

391; *Ballou v. Farnum*, 11 Allen, 73. But see *Albert v. Blecker St., & C. R. Co.*, 2 Daly, 380; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396.

⁴ *New Jersey Ex. Co. v. Nichols*, 4 Vroom, 434, 3 Vroom, 166. It was admitted in *Ballou v. Farnum*, 11 Allen, 73, only to show the extent of the personal injury by reason of the loss of mental vigor and endurance thereby occasioned.

⁵ *Ballou v. Farnum*, 11 Allen, 73; *Shaw v. Boston & W. R. Co.*, 8 Gray, 45, 80; *Baltimore & O. R. Co. v. Shipley*, 31 Md. 368; *Penn. R. Co. v. Books*, 57 Pa. St. 339; *Kansas Pacific R. Co. v. Pointer*, 9 Kan. 620; *Chicago v. O'Brennan*, 65 Ill. 160; *Pittsburg, Ft. W., & C. R. Co. v. Powers*, 74 Ill. 341; *Shea v. Protrero & B. V. R. Co.*, 44 Cal. 414; *Malone v. Hawley*, 46 Cal. 409. But see *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa, 363.

⁶ *Shaw v. Boston & W. R. Co.*, 8 Gray, 45, 80.

⁷ *Brown v. Cummings*, 7 Allen, 507.

⁸ *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa, 363; *Belknap v. Boston & M. R.*, 49 N. H. 358; *Birchard v. Booth*, 4 Wis. 67; *Whitfield v. Westbrook*, 40 Miss. 311; *Chicago City R. Co. v. Henry*, 62 Ill. 142. See *Buckley v. Knapp*, 48 Mo. 152.

⁹ *Dibble v. Morris*, 26 Conn. 416; *St.*

Evidence of the plaintiff's intemperate habits, disqualifying him for business when in a state of intoxication, has been rejected;¹ but evidence that his business, for injury to which he claimed damages, is unlawful has been admitted.²

The plaintiff's damages for diminished capacity to continue his profession are not to be reduced by proof of his enjoyment of an independent income.³

The Husband's Actions for Injuries to the Wife.—In an action by the husband for an injury to his wife, he may recover for loss of service and comfort, and for expenses of medical treatment and nursing; and for injury to his child he may recover for loss of service during minority, and expenses of medical treatment and nursing; but he cannot recover for the bodily and mental pain of the wife or child, or for an injury to his wounded feelings.⁴ A wife, when suing alone for a tort, cannot recover for loss of time, as that belongs to her husband, unless she was carrying on a separate business of her own.⁵

Amount received on an Insurance Policy.—The amount received by the injured person on an accident insurance policy is not to be deducted from his damages.⁶

Injury increased by the Act of the Surgeon.—The fact that the plaintiff's injury has been aggravated by the mistake of a

Peter's Church v. Beach, 26 Conn. 355; *Stimpson v. Railroads*, 1 Wallace, Jr., 164; *Roberts v. Mason*, 10 Ohio St. 277; *Cleveland, C., & C. R. Co. v. Bartram*, 11 Ohio St. 457, 465; *Smith v. Pittsburg, Ft. W., & C. R. Co.*, 23 Ohio St. 10, 18; *Welch v. North Eastern R. Co.*, 12 Rich. 290; *Houston & T. R. Co. v. Oram*, 49 Tex. 341.

¹ *Baltimore & O. R. Co. v. Boteler*, 38 Md. 568.

² *Jacques v. Bridgeport Horse R. Co.*, 41 Conn. 61.

³ *Phillips v. London & S. W. R. Co.*, L. R. 5 C. P. Div. 280, L. R. 4 Q. B. Div. 406, L. R. 5 Q. B. Div. 78.

⁴ *Houston & G. N. R. Co. v. Miller*, 49 Tex. 322; *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9; *Penn. R. Co. v. Kelly*, 31 Pa. St. 372; *Penn. R. Co. v. Zebe*, 33 Pa. St. 318; *Oakland R. Co.*

v. Fielding, 48 Pa. St. 320; *Penn. R. Co. v. Butler*, 57 Pa. St. 335; *Penn. R. Co. v. Goodman*, 62 Pa. St. 329; *State v. Balt. & O. R. Co.*, 24 Md. 84; *Covington St. R. Co. v. Packer*, 9 Bush, 455; *Cregin v. Brooklyn Cross-Town R. Co.*, 75 N. Y. 192, 19 Hun, 341; *Traver v. Eighth Av. R. Co.*, 6 Abbott Pr. n. s. 46, 3 Keyes, 497. It has been held that prospective loss of service cannot be recovered without an appropriate averment. *Gilligan v. New York & E. R. Co.*, 1 E. D. Smith, 453.

⁵ *Tuttle v. Chicago, R. I., & P. R. Co.*, 42 Iowa, 518.

⁶ *Bradburn v. Great Western R. Co.*, L. R. 10 Exch. 1; *Pittsburg, C., & St. L. R. Co. v. Thompson*, 56 Ill. 138; *Harding v. Townshend*, 43 Vt. 536; *Althorf v. Wolfe*, 22 N. Y. 355; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431.

competent surgeon, whom he employed in good faith, will not have the effect to reduce his damages.¹

Vindictive Damages.—Although compensation for the injury is the usual measure of damages, other damages in addition have been allowed where the author of the injury committed it maliciously, wilfully, or even recklessly, or, according to some authorities, with gross carelessness. Such supplementary damages are called exemplary, punitive, retributory, vindictive, or smart-money,—terms which, as used in the law, are synonymous. They are given by way of punishment and example for the general good, and are justified as calculated to prevent moral wrong, violence, outrage, and oppression, and to preserve the public tranquillity. They have been approved by a great number of authorities, the very number of which suggests that they are opposed to a strong pressure of professional opinion.²

Such damages, exceeding compensation for the injury, are not allowed for mere negligence, and they are confined to injuries which were intentional, or prompted by malice or an evil purpose, or caused by such wilfulness or recklessness of conduct

¹ *Sauter v. New York Cent. & H. R. R. Co.*, 66 N. Y. 50, 6 Hun, 446; *Lyons v. Erie R. Co.*, 57 N. Y. 489; *Stover v. Blue-hill*, 51 Me. 439.

² *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9; *Holyoke v. Grand Trunk R. Co.*, 48 N. H. 541; *Belknap v. Boston & M. R.*, 49 N. H. 358; *Devine v. Rand*, 38 Vt. 621; *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Hanson v. European & N. A. R. Co.*, 62 Me. 84; *Ames v. Hilton*, 70 Me. 36; *Phil. W. & B. R. Co. v. Quigley*, 21 How. 202, 213; *Milwaukie & St. P. R. Co. v. Arms*, 91 U. S. 489; *Bannon v. Balt. & O. R. Co.*, 24 Md. 108; *Baltimore & O. R. Co. v. Blocher*, 27 Md. 277; *Baltimore & W. Turnp. Co. v. Boone*, 45 Md. 344; *Phil. W. & B. R. Co. v. Larkin*, 47 Md. 155; *Roberts v. Mason*, 10 Ohio St. 277; *Atlantic & G. W. R. Co. v. Dunn*, 19 Ohio St. 162; *Hodgson v. Millward*, 3 Grant, 406; *Penn. R. Co. v. Zebe*, 33 Pa. St. 318, 330; *Nagle v. Mullison*, 34 Pa. St. 48; *Hunt v. Bennett*, 19 N. Y. 173; *Walker v. Wilson*, 8 Bosw. 586; *Bull v. Griswold*, 19 Ill. 631; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 285; *Foote v. Nichols*, 28 Ill. 486;

Hawk v. Ridgway, 33 Ill. 473; *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218; *Chicago, B., & Q. R. Co. v. Bryan*, 90 Ill. 126; *Williamson v. Western Stage Co.*, 24 Iowa, 171; *Hawkins v. Riley*, 17 B. Monr. 101; *Chiles v. Drake*, 2 Met. (Ky.) 146; *Bowler v. Lane*, 3 Met. (Ky.) 311; *Maysville & L. R. Co. v. Herrick*, 13 Bush, 122; *Claxton v. Lexington & B. S. R. Co.*, 13 Bush, 636; *Birchard v. Booth*, 4 Wis. 67; *Hooker v. Newton*, 24 Wis. 292; *New Orleans, J., & G. N. R. Co. v. Hurst*, 36 Miss. 660; *Whitfield v. Whitfield*, 40 Miss. 352; *Jamison v. Moon*, 43 Miss. 598; *South & N. A. R. Co. v. McLendon*, 10 Reporter, 688; *Kennedy v. North Mo. R. Co.*, 36 Mo. 351; *Buckley v. Knapp*, 48 Mo. 152; *Perkins v. Mo., K., & T. R. Co.*, 55 Mo. 201; *Malecek v. Tower Grove & L. R. Co.*, 57 Mo. 17; *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503; *Lyon v. Hancock*, 35 Cal. 372; *Wade v. Thayer*, 40 Cal. 578; *Berry v. Fletcher*, 1 Dill. 67; *Holmes v. Sheridan*, 1 Dill. 351; *Beale v. Railway Co.*, 1 Dill. 568; *Quigley v. Central Pacific R. Co.*, 11 Nev. 350.

as raises a presumption of conscious indifference to the rights of others.¹

A distinction has been taken in some States where such supplementary damages are allowed, by which they are confined to a person's own act, excluding them where the injury is committed by his servant, without any wrongful act or conduct of his own. Accordingly, a corporation has been held not liable for the tortious acts of its servant beyond compensatory damages, unless it authorized or ratified such acts, or was culpable in employing him, or in continuing him in its service with knowledge of his want of care and skill or bad habits, or in its general instructions and regulations.² It has also been held that while the corporation would, without any direct culpability of its own, be liable for punitive damages where the servant's act was wilful or wanton, it would not be so liable if the act were only one of gross negligence.³ Other authorities hold the master liable for such damages, wherever they would be recoverable against him if the act had been his own instead of the servant's.⁴

Vindictive damages are limited in some States to injuries not cognizable by the criminal law, as otherwise there would be a double punishment for the same offence.⁵ In some States they

¹ Peoria Bridge Assoc. v. Loomis, 20 Ill. 235; Pierce v. Millay, 44 Ill. 189; Milwaukie & St. P. R. Co. v. Arms, 91 U. S. 489; Phil. W., & B. R. Co. v. Quigley, 21 How. 202, 214; Kennedy v. North Mo. R. Co., 36 Mo. 351; Edelmann v. St. Louis Transfer Co., 3 Mo. App. 503; Pleasants v. North Beach & M. R. Co., 34 Cal. 586; Turner v. North Beach & M. R. Co., 34 Cal. 594; Kentucky Cent. R. Co. v. Dills, 4 Bush, 593; Pittsburg, Ft. W., & C. R. Co. v. Slusser, 19 Ohio St. 157; Belknap v. Boston & M. R., 49 N. H. 358; Ackerson v. Erie R. Co., 3 Vroom, 254; Hamilton v. Third Av. R. Co., 53 N. Y. 25; Union Pacific R. Co. v. Hause, 1 Wyoming, 27; Kansas Pacific R. Co. v. Lundin, 3 Col. 94.

² Hagan v. Providence & W. R. Co., 3 R. I. 88; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Hamilton v. Third Av. R. Co., 53 N. Y. 25; Cleghorn v. New York Cent. & H. R. R. Co., 56 N. Y. 44; Townsend v. New York Cent. & H. R. R. Co., 56 N. Y. 295; Parker v. Long Island R. Co., 13 Hun, 319; Hays v. Houston & G. N. R. Co., 46 Tex. 272; Ackerson v. Erie R. Co., 3 Vroom, 254;

Milwaukie & M. R. Co. v. Finney, 10 Wis. 388; Detroit Daily Post v. McArthur, 16 Mich. 447; Great Western R. Co. v. Miller, 19 Mich. 305; Wardrobe v. California Stage Co., 7 Cal. 118; Turner v. North Beach & M. R. Co., 34 Cal. 594; Wade v. Thayer, 40 Cal. 578; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 654; Hill v. New Orleans, O., & G. W. R. Co., 11 La. An. 292; Edelmann v. St. Louis Transfer Co., 3 Mo. App. 503.

³ Illinois Cent. R. Co. v. Hammer, 72 Ill. 347.

⁴ Hopkins v. Atlantic & St. L. R. Co., 36 N. H. 9; Goddard v. Grand Trunk R. Co., 57 Me. 202; Beale v. Railway Co., 1 Dill. 568; New Orleans, J., & G. N. R. Co. v. Bailey, 40 Miss. 395; Pittsburg, Ft. W., & C. R. Co. v. Slusser, 19 Ohio St. 157; Atlantic & G. W. R. Co. v. Dunn, 19 Ohio St. 162; Quigley v. Cent. Pacific R. Co., 11 Nev. 350; Gasway v. Atlanta & W. P. R. Co., 58 Ga. 216; Haley v. Mobile & O. R. Co., 7 Baxter (Tenn.), 239.

⁵ Austin v. Wilson, 4 Cush. 273; Whitney v. Hitchcock, 4 Denio, 461; Fay v.

are only recoverable when circumstances justifying them are averred in the declaration.¹ They are not recoverable in an action of contract.²

Vindictive damages, while generally approved by the authorities, have been at times disapproved as contrary to legal principle and public policy.³ 1. The allowance of such damages confounds two jurisdictions which ought to be distinct, — the civil, which, at the suit of the individual, restores to him his property or rights, or compensates him for their loss where it cannot restore; and the criminal, which, at the instance of society, punishes by fine and imprisonment with a view to deter and reform offenders. 2. It effects a double punishment whenever the act complained of is a criminal offence. 3. It gives to the injured party, who is presumed to have had full satisfaction under the general rule of compensatory damages, a further sum which, if to be exacted at all, should, like fines in criminal prosecutions, be paid into the public treasury. 4. It intrusts to the jury a discretion in fixing the amount of what is allowed as a punishment, — a power which is found in criminal causes to be more wisely administered by the court. 5. It tends to disturb the judgments of juries who are unused to the duty of determining what is the measure of a social wrong. It thus encourages extravagant estimates of damages, and creates the necessity of a frequent interference by the court, in the revision of verdicts, with the peculiar functions of the jury.

Damages for wounded feelings are, as already stated, allowed under circumstances of aggravation, and many cases, it may be remarked, which approve the punitive principle, may be sustained as consistent with the rule of compensation, which is the foundation of the law of damages.

Verdicts set aside for Excessive or Inadequate Damages. — The court will set aside a verdict for excessive damages. It will

Parker, 53 N. H. 342. *Contra*, Chiles v. Drake, 2 Met. (Ky.) 146; Roberts v. Mason, 10 Ohio St. 277.

¹ Johnson v. Chicago, R. I., & P. R. Co., 51 Iowa, 25.

² Walsh v. Chicago, M., & St. P. R. Co., 42 Wis. 23.

³ Fay v. Parker, 53 N. H. 342; Wardrobe v. California Stage Co., 7 Cal. 118;

Freidenheit v. Edmundson, 36 Mo. 226; McKeon v. Citizens' R. Co., 42 Mo. 79; Macon & W. R. Co. v. Winn, 26 Ga. 250, 265; Malone v. Murphy, 2 Kan. 250; Dougherty v. Shown, 1 Heisk. 302; Union Pacific R. Co. v. Hause, 1 Wyoming, 27; 3 Am. Jur. 287, 292, article by T. Metcalf; 2 Greenleaf on Evidence, § 253.

interfere in this way where the damages so far exceed reasonable compensation as to show that the jury acted under the influence of prejudice or passion, or where they appear "at first blush" to be excessive. While such phrases are used in revising verdicts, it will be found that the judicial power intervenes where the damages appear to largely exceed just compensation for the injury.¹

Where the damages are excessive, the court, instead of setting the verdict aside, may fix a reasonable sum, allowing it to stand upon the plaintiff's remitting the excess.²

The tendency of juries to give excessive damages against corporations, particularly in actions for personal injuries, and the necessity of controlling their discretion, has been the subject of judicial comment.³

¹ Verdicts were set aside as excessive in *L. & N. R. Co. v. Fox*, 11 Bush, 495; *Belknap v. Boston & M. R.*, 49 N. H. 358; *Chicago, B., & Q. R. Co. v. Parks*, 18 Ill. 460; *Peoria Bridge Assoc. v. Loomis*, 20 Ill. 235; *Terre Haute, A., & St. L. R. Co. v. Vanatta*, 21 Ill. 188; *Chicago, B., & Q. R. Co. v. Hazzard*, 26 Ill. 373; *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218; *Pierce v. Millay*, 44 Ill. 189; *Chicago & N. W. R. Co. v. Peacock*, 48 Ill. 253; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; *Chicago, B., & Q. R. Co. v. Dunn*, 52 Ill. 451; *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 265; *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167; *Illinois Cent. R. Co. v. Ebert*, 74 Ill. 399; *Penn. R. Co. v. Kelly*, 31 Pa. St. 372; *New Orleans, J., & G. N. R. Co. v. Statham*, 42 Miss. 607; *Pleasants v. North Beach & M. R. Co.*, 34 Cal. 586; *Turner v. North Beach & M. R. Co.*, 34 Cal. 594; *Clapp v. Hudson River R. Co.*, 19 Barb. 461; *Murray v. Hudson River R. Co.*, 47 Barb. 196. The court refused to set the verdict aside in *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Hanson v. European & N. A. R. Co.*, 62 Me. 84; *Shaw v. Boston & W. R. Co.*, 8 Gray, 45; *Collins v. Albany & S. R. Co.*, 12 Barb. 492; *Hegeman v. Western R. Co.*, 16 Barb. 353; *Curtiss v. Rochester & S. R. Co.*, 20 Barb. 282; *Maloy v. New York Cent. R. Co.*, 58 Barb. 182; *Mentz v. Second Av. R. Co.*, 2 Rob. (N. Y.) 356; *Mooney v. Hudson River R. Co.*, 1 Sweeny, 325; *Cox v. New York Cent. & H. R. Co.*,

4 Hun, 176; *Peck v. New-York Cent. & H. R. Co.*, 4 Hun, 236; *O'Donnell v. New York & H. R. Co.*, 8 Daly, 409; *Wheaton v. North Beach & M. R. Co.*, 36 Cal. 590; *Robinson v. Western Pacific R. Co.*, 48 Cal. 409; *Schmidt v. Mil. & St. P. R. Co.*, 23 Wis. 186; *Duffy v. Chicago & N. W. R. Co.*, 34 Wis. 188; *Berg v. Chicago, M., & St. P. R. Co.*, 7 Northwest. Rep. 347; *Kennedy v. North Mo. R. Co.*, 36 Mo. 351; *Whalen v. St. Louis, K. C., & N. R. Co.*, 60 Mo. 323; *Sherley v. Billings*, 8 Bush, 147; *Maysville & L. R. Co. v. Herrick*, 13 Bush, 122; *Houston & G. N. R. Co. v. Randall*, 50 Tex. 254; *New Orleans, J., & G. N. R. Co. v. Hurst*, 36 Miss. 660; *Russ v. Steamboat War Eagle*, 14 Iowa, 363; *Macon & W. R. Co. v. Winn*, 26 Ga. 250; *Union Pacific R. Co. v. Young*, 19 Kan. 488; *Lambkin v. South Eastern R. Co.*, L. R. 5 App. Cas. 352; *Phillips v. London & S. W. R. Co.*, L. R. 4 Q. B. Div. 406; L. R. 5 Q. B. Div. 78, L. R. 5 C. P. Div. 280.

² *Belknap v. Boston & M. R.*, 49 N. H. 358; *Ackerson v. Erie R. Co.*, 3 Vroom, 254; *Collins v. Albany & S. R. Co.*, 72 Barb. 492.

³ *Williamson v. Western Stage Co.*, 24 Iowa, 171; *Pittsburg, A., & M. Pass. R. Co. v. Donahue*, 70 Pa. St. 119, 124; *Penn. R. Co. v. Kelly*, 31 Pa. St. 372; *Penn. R. Co. v. Zebe*, 33 Pa. St. 318, *Penn. R. Co. v. Ogier*, 35 Pa. St. 60; *Penn. R. Co. v. Vandever*, 36 Pa. St. 298; *State v. Balt. & O. R. Co.*, 24 Md. 84, 107; *Bannon v. Balt. & O. R. Co.*, 24 Md.

The court will grant a new trial in an action for personal injuries on the ground of inadequacy of damages, where it appears upon the facts proved that the jury must have omitted to take into consideration some of the elements of damage which ought to have been taken into account.¹ ,

Damages for Torts to Personal Property. — The damages for personal property taken or destroyed is its market value at the time, with interest.² If only injured, the damages will be the diminution in market value, with reasonable expenses, the whole not to exceed the market value.³

108, 123; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; *Chicago, B., & Q. R. Co. v. Dunn*, 52 Ill. 451; *Chicago & A. R. Co. v. Adler*, 56 Ill. 344.

² *Toledo & W. R. Co. v. Smith*, 25 Ind. 288; *Jamison v. Moon*, 43 Miss. 598.

¹ *Phillips v. South Western R. Co.*, L. R. 4 Q. B. Div. 406, L. R. 5 Q. B. Div. 78, L. R. 5 C. P. D. 280.

³ *Gillett v. Western R. Co.*, 8 Allen, 560; *Atlanta & W. P. R. Co. v. Hudson*, 62 Ga. 679.

CHAPTER XI.

NEGLIGENCE.

A CRITICAL treatment of the various formulas concerning negligence will not be attempted in this chapter, and treatises upon the special topic are referred to for a discussion of the subtleties with which it abounds. It will be sufficient in this connection to state the rules which have the support of the authorities, without attempting what is as yet impossible to reduce them to a consistent body of doctrine.

Negligence defined. — Actionable negligence involves the breach of a legal duty. It consists, in the case of persons who are not in a relation of privity, in the exercise of rights in a manner which is not according to the conduct of reasonable and prudent men in a like situation, and which results in injury to others.¹ Negligence is actionable only when it causes injury.²

Liability for Negligence limited to the Natural and Probable Consequences of the Wrongful Act. — Liability for negligence includes injuries which are the natural and probable consequences of the negligent act or omission.³ It does not extend to consequences which no reasonable man would expect to occur.⁴ The act or omission, in order to be actionable, must be the efficient cause of the injury.⁵ The law, according to the familiar maxim,

¹ *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 441. Swayne, J.: "Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion."

² *Chicago W. D. R. Co. v. Rend*, 6 Brad. (Ill.) 243; *Cosgrove v. New York Cent. & H. R. R. Co.*, 13 Hun, 329; *Barringer v. New York Cent. & H. R. R. Co.*, 18 Hun, 398.

³ *Lane v. Atlantic Works*, 111 Mass. 186, 107 Mass. 104; *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399, 410; *Penn. R. Co. v. Kerr*, 62 Pa. St. 353; *Oil Creek & A. R. R. Co. v. Keighron*, 74 Pa. St. 316; *Cuff v. Newark & N. Y. R. Co.*, 6 Vroom, 17, 30; *Milwaukie & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Pullman Palace Car Co. v. Barker*, 4 Col. 344.

⁴ *Greenland v. Chaplin*, 5 Exch. 243, 248.

⁵ *Marble v. Worcester*, 4 Gray, 395; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25, 30.

—*in jure causa proxima, non remota, spectatur*, — regards the proximate and not the remote cause; and the proximate cause has been defined to be “the cause which naturally led to, and which might have been expected to be directly instrumental in producing, the result.”¹ The injury will not be deemed too remote if, according to the common experience of mankind, it ought to have been apprehended as a consequence of the act.²

The wrongful act may be the cause of an injury, although many circumstances intervene between the act and the injury.³ It may be the efficient and responsible cause, notwithstanding the intervention of the negligence or act of a third person;⁴ or of the viciousness of an animal which was unknown to the person driving it;⁵ or of natural causes.⁶ The question, what was the proximate cause of an injury, is ordinarily one for the jury.⁷

Relation of the Court and Jury to the Question of Negligence. — The respective functions of the court and of the jury in determining questions of negligence cannot be defined by any one formula. The court declares the legal duty, and the jury finds the facts, both those out of which the duty arises and those which involve a breach or performance. The jury applies the law as declared by the court to the facts, and determines by its verdict, as a final conclusion, what the duty in question was, and whether or not it was performed. Its control over issues of fact and its application of the law to the facts are by no means final. The court, however, while not interfering with the right of the jury to pass on all questions of fact where the common judgments of men may reasonably differ as to the conclusion, will interfere by

¹ *State v. Manchester & L. R. Co.*, 52 N. H. 528, 552. See criticisms of the maxim, as applied to this class of cases, in *Rauch v. Lloyd*, 31 Pa. St. 358, 366; *Penn. R. Co. v. Kelly*, 31 Pa. St. 372, 377; *Lewis v. Balt. & O. R. Co.*, 38 Md. 588, 599. See *post*, Chap. XVI. p. 441, for a further treatment of the question of the proximate and remote cause.

² *Lane v. Atlantic Works*, 111 Mass. 136; *Derry v. Flitner*, 118 Mass. 131.

³ *Norton v. Eastern R. Co.*, 113 Mass. 366; *Lee v. Union R. Co.*, 12 R. I. 383; *Milwaukie & St. P. R. Co. v. Kellogg*, 94 U. S. 469.

⁴ *Lane v. Atlantic Works*, 111 Mass.

136, 107 Mass. 104; *Eaton v. Boston & L. R. Co.*, 11 Allen, 500; *Simmons v. New Bedford, V., & N. S. Co.*, 97 Mass. 361, 368, 100 Mass. 34; *Harvey v. New York Cent. & H. R. R. Co.*, 19 Hun, 556; *Clark v. Chambers, L. R.* 3 Q. B. Div. 327. See *Brandon v. Gulf City Cotton Press & M. Co.*, 51 Tex. 121, 128.

⁵ *Harris v. Mobbs*, L. R. 3 Exch. Div. 268.

⁶ *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339; *Brehm v. Great Western R. Co.*, 34 Barb. 256.

⁷ *Milwaukie & St. P. R. Co. v. Kellogg*, 94 U. S. 469.

a nonsuit, or setting aside of the verdict, where no evidence has been given from which the inference of a legal duty and its breach can be legitimately made.

The standard of negligence is so variable, and even intangible, and sentiment and caprice are so apt to disturb the judgment of jurors in cases of personal injury, that the corrective function of the court in supervising verdicts in such cases is essential to the administration of justice.¹ A nonsuit does not violate the constitutional right to a trial by jury in civil causes.²

Negligence a Mixed Question of Law and Fact. — An exact definition of the relation of the court to the jury, where the issue is negligence, is not attainable, but it will be convenient to give the results reached by the authorities, although variations in the modes of statement will be recognized.

Negligence is usually stated to be a mixed question of law and fact,³ or a question of fact, which is to be found, however, under the instructions of the court.⁴ The two forms of expression do not seem to indicate any different theories of the relations of the court and jury to the legal inquiry whether a cause of action has arisen. Negligence cannot be exclusively a question of fact.⁵

A high authority has said, "The judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether,

¹ The disposition of juries in such cases against corporations to find issues against evidence has been the subject of judicial comment. *Haring v. New York & E. R. Co.*, 13 Barb. 9, 15; *Suydam v. Grand Street & N. R. Co.*, 41 Barb. 375, 380; *Chicago & A. R. Co. v. Adler*, 56 Ill. 344; *St. Louis, A., & T. R. Co. v. Manly*, 58 Ill. 300, 309.

² *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468.

³ *Trow v. Vt. Cent. R. Co.*, 24 Vt. 487, 497; *Wright v. Malden & M. R. Co.*, 4 Allen, 283, 289; *Cleveland, C., & C. R. Co. v. Terry*, 8 Ohio St. 570, 584; *Cleveland, C. C., & I. R. Co. v. Elliott*, 28 Ohio St. 340; *Bannon v. Balt. & O. R. Co.*, 24 Md. 108, 124; *Baltimore & O. R. Co. v. Breinig*, 25 Md. 378, 385; *Johnson v. Winona & St. P. R. Co.*, 11 Minn. 296; *Greenleaf v. Ill. Cent. R. Co.*, 29 Iowa, 14, 37; *Greenleaf v. Dubuque & S. C. R. Co.*,

33 Iowa, 52; *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45; *North Penn. R. Co. v. Robinson*, 44 Pa. St. 175, 179; *Kay v. Penn. R. Co.*, 65 Pa. St. 269, 274; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 38; *Karle v. Kansas City, St. J., & C. B. R. Co.*, 55 Mo. 476.

⁴ *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 487; *Macon & W. R. Co. v. Davis*, 18 Ga. 679, 687; *Thurber v. Harlem, B. M., & F. R. Co.*, 60 N. Y. 326, 331; *Burton v. Phil., W., & B. R. Co.*, 4 Harring. (Del.) 252; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99, 118; *Northern Cent. R. Co. v. State*, 29 Md. 420, 440; *Union Pacific R. Co. v. Rollins*, 5 Kan. 167, 181; *Smith v. Hannibal & St. J. R. Co.*, 37 Mo. 287, 292; *Brennan v. Fair Haven & W. R. Co.*, 45 Conn. 284, 297.

⁵ *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 294.

from those facts, when submitted to them, negligence *ought to be* inferred." ¹

The relevancy of evidence, and whether any exists which tends to prove or is capable of proving negligence, is for the court. ²

The Jury to decide upon Conflicting Evidence.—Questions of conflicting evidence are for the jury. The court, therefore, on a motion for a nonsuit will not pass upon the weight of evidence, but will assume the truth of the plaintiff's evidence to be conceded; ³ and this rule applies even where the conclusion is one of science and experience. ⁴

The Jury decide as to the Care or Negligence of each Party under the Direction of the Court.—Where the gist of the action is negligence, it is for the jury to find, under the direction of the court as to the law, whether the defendant has failed to exercise due care, and by the want of it caused the injury, and also whether the plaintiff has failed to exercise due care, and by the want of it contributed to the injury. ⁵

¹ Metropolitan R. Co. v. Jackson, L. R. 3 App. Cas. 193, 197 (1877), Lord Cairns, Chancellor; s. c. L. R. 10 C. P. 49, L. R. 2 C. P. Div. 125 (see comments in this case on Bridges v. North London R. Co., L. R. 7 H. L. 213).

² Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274, 294.

³ Bernhard v. Rensselaer & S. R. Co., 1 Abbott Ct. App. 131, 32 Barb. 165, 23 How. Pr. 166; Cook v. New York Cent. R. Co., 1 Abbott Ct. App. 432; Dickens v. New York Cent. R. Co., 1 Abbott Ct. App. 504; Keller v. New York Cent. R. Co., 2 Abbott Ct. App. 480; Sheridan v. Brooklyn City & N. R. Co., 36 N. Y. 39; Wolfkiel v. Sixth Av. R. Co., 38 N. Y. 49; Hackford v. New York Cent. & H. R. R. Co., 53 N. Y. 654, 43 How. Pr. 222; Belton v. Baxter, 58 N. Y. 411, 54 N. Y. 245; Weber v. New York Cent. & H. R. R. Co., 58 N. Y. 451; McPadden v. New York Cent. R. Co., 47 Barb. 247; Barrett v. Third Av. R. Co., 1 Sweeny, 568, 574; O'Donnell v. New York & H. R. Co., 8 Daly, 409; Reed v. Deerfield, 8 Allen, 522; Gaynor v. Old Colony & N. R. Co., 100 Mass. 208, 212; Brooks v. Somerville, 106 Mass. 271; Commonwealth v. Vt. & M. R. Co.,

108 Mass. 7, 12; Boland v. Mo. R. Co., 36 Mo. 484, 491; Owens v. Hannibal & St. J. R. Co., 58 Mo. 386, 393; Cleveland, C., & C. R. Co. v. Crawford, 24 Ohio St. 631; Butler v. Mil. & St. P. R. Co., 28 Wis. 487; Penn. R. Co. v. Ogier, 35 Pa. St. 60; Penn. R. Co. v. Barnett, 59 Pa. St. 259; Sherman v. Western Stage Co., 24 Iowa, 515; Greenleaf v. Ill. Cent. R. Co., 29 Iowa, 14; Chicago & A. R. Co. v. Shannon, 48 Ill. 338; Cumberland & P. R. Co. v. State, 37 Md. 156; Dublin, W., & W. R. Co. v. Slaterry, L. R. 3 App. Cas. 1155, Ir. R. 8 C. L. 531, Ir. R. 10 C. L. 256.

⁴ Gagg v. Vetter, 41 Ind. 228; Free-mantle v. London & N. W. R. Co., 10 C. B. n. s. 89.

⁵ Ernst v. Hudson River R. Co., 35 N. Y. 9; Jetter v. New York & H. R. Co., 2 Abbott Ct. App. 458; Mowrey v. Central City R. Co., 51 N. Y. 666, 66 Barb. 43; Terry v. Jewett, 78 N. Y. 338, 17 Hun, 395; Casey v. New York Cent. & H. R. R. Co., 78 N. Y. 518, 6 Abbott N. C. 104; Maloy v. New York Cent. R. Co., 58 Barb. 182; Pendril v. Second Av. R. Co., 34 N. Y. Superior, 481; Hawley v. Northern Cent. R. Co., 17 Hun, 115, 22 A. L. J.

When the Court may declare Certain Acts or Conduct to be Negligence. — Some authorities state or imply that it is for the court to determine what facts constitute negligence, and for the jury only to find whether they exist; or, if the facts are conceded or established by uncontradicted evidence, that it is for the court to declare as matter of law whether they constitute negligence.¹ This is true as to conduct which is demonstrated by common experience to be negligence, and which is assumed to be such by the court, unless excused by special circumstances;² but it is not true where inferences are to be made from admitted or proven facts.³ Generally, the court defines the rule or standard of care, illustrating it by an application to circumstances such as those which are in evidence; and the jury find whether the facts proved establish such care, or the want of it.⁴ Whether a given state of facts constitutes negligence, it is said, is a question of law; but whether a particular negligence contributed to the injury

433; *Mahar v. Grand Trunk R. Co.*, 19 Hun, 32; *O'Donnell v. New York & H. R. Co.*, 8 Daly, 409; *Bradley v. Boston & M. R.*, 2 Cush. 539, 543; *Eagan v. Fitchburg R. Co.*, 101 Mass. 315; *Simmons v. New Bedford, V., & N. S. Co.*, 97 Mass. 361, 100 Mass. 34; *Chaffee v. Boston & L. R. Co.*, 104 Mass. 108; *Commonwealth v. Vt. & M. R. Co.*, 108 Mass. 7; *Tyrrell v. Eastern R. Co.*, 111 Mass. 546; *French v. Taunton Branch R. Co.*, 116 Mass. 537; *Craig v. New York, N. H., & H. R. Co.*, 118 Mass. 431; *Robinson v. Cone*, 22 Vt. 213, 225; *Webb v. Portland & K. R. Co.*, 57 Me. 117, 134; *Baltimore & O. R. Co. v. State*, 29 Md. 252; *Northern Cent. R. Co. v. State*, 29 Md. 420, 440; *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 32; *Cumberland & P. R. Co. v. State*, 37 Md. 156; *Baltimore & O. R. Co. v. Boteler*, 38 Md. 568, 586; *Huyett v. Phil. & R. R. Co.*, 23 Pa. St. 373; *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361; *Kay v. Penn. R. Co.*, 65 Pa. St. 269; *Indianapolis & St. L. R. Co. v. Evans*, 88 Ill. 63; *Duffy v. Chicago & N. W. R. Co.*, 32 Wis. 269; *McNamara v. North Pacific R. Co.*, 50 Cal. 581; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Kennayde v. Pacific R. Co.*, 45 Mo. 255; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 487; *Macon & W. R. Co. v. Winn*, 26 Ga. 250, 251; *Cohen v. Eureka & P. R. Co.*, 14 Nev. 376; *Central Branch Union P. R.*

Co. v. Hotham, 22 Kan. 41; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686, 18 Kan. 34; *Houston & G. N. R. Co. v. Miller*, 51 Tex. 270; *Aldridge v. Great Western R. Co.*, 3 M. & G. 515; *Clayards v. Dethick*, 12 Q. B. 439.

¹ *Moore v. Central R. Co.*, 4 Zab. 268, 277, 824; *Gonzales v. New York & H. R. Co.*, 38 N. Y. 440, 6 Rob. (N. Y.) 93; *Ginnon v. New York & H. R. Co.*, 3 Rob. (N. Y.) 25; *Solomon v. Central Park, N., & E. R. Co.*, 1 Sweeny, 298; *Hodencamp v. Second Av. R. Co.*, 1 Sweeny, 490; *Herring v. Wilmington & R. R. Co.*, 10 Ired. 402; *Tarwater v. Hannibal & St. J. R. Co.*, 42 Mo. 193; *Maher v. Atlantic & P. R. Co.*, 64 Mo. 267; *Spofford v. Harlow*, 3 Allen, 176; *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Grows v. Maine Cent. R. Co.*, 67 Me. 100; *Gerke v. Cal. Steam Nav. Co.*, 9 Cal. 251; *Flemming v. Western Pacific R. Co.*, 49 Cal. 253; *Kansas Pacific R. Co. v. Butts*, 7 Kan. 308; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185, 192; *Louisville & P. C. Co. v. Murphy*, 9 Bush, 522; *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35.

² *Post*, p. 316.

³ *Post*, p. 317.

⁴ *Baltimore & O. R. Co. v. State*, 29 Md. 252, 263; *Baltimore & O. R. Co. v. State*, 36 Md. 366, 378; *Cumberland & P. R. Co. v. State*, 37 Md. 156.

involves an inference from the facts which is to be made by the jury.¹

Where the facts are undisputed, the question whether they amount to negligence or not may be one of law or of fact. If, in the light of common experience, the inference of the plaintiff's negligence from the proof is clear, not admitting of controversy among reasonable men, the court will rule it as a question of law. Thus, "if a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault, and no action can be sustained by him or his representatives."² To the same effect in other language the rule has been stated thus: "When the facts are clearly settled, and the course which common prudence dictated can be readily discerned, the court should decide the case as a matter of law."³

The court takes judicial notice of the power, speed, and management of railway trains, and of common experience;⁴ and, where the plaintiff's negligence contributing to the injury appears by his own case in some glaring and decisive act or omission, the court will order a verdict for the defendant or a nonsuit.⁵

If, as a matter of common knowledge and experience, the court sees upon the undisputed facts of the case that the plaintiff was not in the exercise of ordinary care, and that the injury was in part attributable to his want of such care, it will, as he has shown

¹ *Catawissa R. Co. v. Armstrong*, 52 Pa. St. 282; *Johnson v. West Chester & P. R. Co.*, 70 Pa. St. 357. But see *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 193.

² *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 663; *Cleveland, C., & C. R. Co. v. Crawford*, 24 Ohio St. 631; *Marietta & C. R. Co. v. Picksley*, 24 Ohio St. 654; *Penn. R. Co. v. Rathgeb*, 32 Ohio St. 66; *Lewis v. Balt. & O. R. Co.*, 38 Md. 588; *Goldstein v. Chicago, M., & St. P. R. Co.*, 46 Wis. 404.

³ *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45, 50; *Shearman & Redfield on Negligence*, § 11.

⁴ *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Wheelock v. Boston & A. R. Co.*, 105 Mass. 203.

⁵ *Baltimore & O. R. Co. v. Shipley*,

31 Md. 368; *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 32; *Baltimore & O. R. Co. v. State*, 36 Md. 366; *Lewis v. Balt. & O. R. Co.*, 38 Md. 588; *McMahon v. Balt. & O. R. Co.*, 39 Md. 438; *Northern Cent. R. Co. v. State*, 29 Md. 420; *Penn. R. Co. v. Ogier*, 35 Pa. St. 60; *Phil. City Pass. R. Co. v. Hassard*, 75 Pa. St. 367; *Penn. R. Co. v. Weber*, 76 Pa. St. 157; *Flemming v. Western Pacific R. Co.*, 49 Cal. 253; *Donaldson v. Mil. & St. P. R. Co.*, 21 Minn. 293; *Carlin v. Chicago, R. I., & P. R. Co.*, 37 Iowa, 316; *Gonzales v. New York & H. R. Co.*, 38 N. Y. 440; *Ginnon v. New York & H. R. Co.*, 3 Rob. (N. Y.) 25; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657; *Dublin, W., & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155, Ir. R. 8 C. L. 531, Ir. R. 10 C. L. 256.

no legal cause of action, order a nonsuit, or direct a verdict against him.¹ If the facts are such that all reasonable men would be likely to draw from them the same inferences, the question of negligence is one of law for the court; but, if they might differ as to the conclusion, the question is one of fact for the jury.²

The following are illustrations of acts and omissions which, unless excused or qualified by special circumstances, are deemed negligence in a plaintiff, requiring, when shown by his evidence, a nonsuit or withdrawal of the case from the jury; viz., failure to use his senses by looking up and down the track in crossing the railroad at a highway crossing;³ sitting, walking, or being on the track without right;⁴ inattention to his dangerous position when on the track, whether there lawfully or not;⁵ passing under or between, or over the platform of, cars in motion, or likely to move at once, although they are improperly blocking the highway, or the company may have omitted to give the usual signals;⁶ stopping behind cars which are stationary on the track;⁷ or opening gates across the highway which are under the company's exclusive control, although no gate-keeper is in attendance.⁸ And

¹ *Chaffee v. Boston & L. R. Co.*, 104 Mass. 108; *Allyn v. Boston & A. R. Co.*, 105 Mass. 77; *Wheelock v. Boston & A. R. Co.*, 105 Mass. 203; *Clark v. Boston & A. R. Co.*, 128 Mass. 1; *Mills v. Lyon & B. R. Co.*, 129 Mass. ; *Wright v. Malden & M. R. Co.*, 4 Allen, 283; *Snow v. Housatonic R. Co.*, 8 Allen, 441, 448; *Penn. R. Co. v. Rathgeb*, 32 Ohio St. 66.

² *Ernst v. Hudson River R. Co.*, 39 N. Y. 61, 68, 35 N. Y. 9, 32 Barb. 59; *Thurber v. Harlem, B., M., & F. R. Co.*, 60 N. Y. 326, 331; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 294; *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294, 297; *Cleveland, C., & C. R. R. Co. v. Crawford*, 24 Ohio St. 631; *Penn. R. Co. v. Rathgeb*, 32 Ohio St. 66.

³ See cases cited *post*, Chap. XII. p. 343.

⁴ *Cogswell v. Oregon & C. R. Co.*, 6 Oreg. 417; *Ostertag v. Pacific R. Co.*, 64 Mo. 421; *O'Donnell v. Mo. Pacific R. Co.*, 7 Mo. App. 190; *Lang v. Holiday Creek R. Co.*, 42 Iowa, 677; *Van Schaick v. Hudson River R. Co.*, 43 N. Y. 527; *Richmond & D. R. Co. v. Anderson*, 31 Gratt. 812. It is not negligence for a servant to be on the road when engaged in the line

of his duty. *Steele v. Cent. R. Co.*, 43 Iowa, 109.

⁵ *Burns v. Boston & L. R. Co.*, 101 Mass. 50; *Deville v. Southern Pacific R. Co.*, 50 Cal. 383.

⁶ *Lewis v. Balt. & O. R. Co.*, 38 Md. 588; *McMahon v. Northern Cent. R. Co.*, 39 Md. 438; *Chicago, B., & Q. R. Co. v. Dewey*, 26 Ill. 255; *Gahagan v. Boston & L. R. Co.*, 1 Allen, 187; *O'Mara v. Del. & H. C. Co.*, 18 Hun, 192; *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671; *Central R. & B. Co. v. Dixon*, 42 Ga. 327. But see as to a servant engaged in the performance of his duty, *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Berry v. Central R. Co.*, 40 Iowa, 564; *Steele v. Central R. Co.*, 43 Iowa, 109; and the case of a child of tender years, *Rauch v. Lloyd*, 31 Pa. St. 358, 370. Whether the act of passing through an open space between stationary cars is negligence, may, under some circumstances, be a question for the jury. *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 32.

⁷ *Van Schaick v. Hudson River R. Co.*, 43 N. Y. 527.

⁸ *Wyatt v. Great Western R. Co.*, 6 Best & S. 709.

the following are illustrations of similar acts in the case of a passenger, which are deemed negligence: resting the elbow by a window, so that it projects beyond the external surface of the car;¹ entering or leaving the train while in motion;² standing on the platform of a moving car;³ leaving the train at an improper place, instead of by the platform;⁴ going on the track without reason, after leaving the train;⁵ entering or leaving a street car by the front platform, contrary to the regulations;⁶ leaving it without proper notice of his purpose to the conductor;⁷ riding on the engine, pilot, or cow-catcher;⁸ or riding in the baggage-car in violation of the company's known rules.⁹

The facts being conceded, it may still be a question for the jury whether they make a case of negligence. Negligence, it should be observed, is itself not a fact, but an inference from facts.¹⁰ If it is not shown by some definite and positive fact, the effect of which is not open to reasonable question, but depends upon inferences from facts, in making which sensible and impartial men may well disagree, the question is for the jury.¹¹ It is

¹ *Todd v. Old Colony & F. R. R. Co.*, 3 Allen, 18, 7 Allen, 207; *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 329; *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. St. 294; *Louisville & N. R. Co. v. Sickings*, 5 Bush, 1. But see *Spencer v. Mil. & P. R. Co.*, 17 Wis. 487; *Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

² *Lucas v. New Bedford & T. R. Co.*, 6 Gray, 64; *Gavett v. Manchester & L. R. Co.*, 16 Gray, 501; *Ginnon v. New York & H. R. Co.*, 3 Rob. (N. Y.) 25; *Ohio & M. R. Co. v. Schiebe*, 44 Ill. 460; *Lake Shore & M. S. R. Co. v. Roy*, 5 Brad. (Ill.) 82; *Galveston, H. & S. A. R. Co. v. Gierse*, 51 Tex. 189; *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 593; *Harvey v. Eastern R. Co.*, 116 Mass. 269; *Penn. R. Co. v. Aspell*, 23 Pa. St. 147; *Richmond & D. R. Co. v. Morris*, 31 Gratt. 200; *Knight v. Pontchartrain R. Co.*, 23 La. An. 462. But see as to leaving or entering street or steam cars in motion under special circumstances, *Wyatt v. Citizens R. Co.*, 55 Mo. 485; *Johnson v. West Chester & P. R. Co.*, 70 Pa. St. 357; *Lambeth v. North Carolina R. Co.*, 66 N. C. 494.

³ *Hickey v. Boston & L. R. Co.*, 14 Allen, 429; *Solomon v. Central Park, N. & E. R. R. Co.*, 1 Sweeny, 298; *Quinn v. Ill. Cent. R. Co.*, 51 Ill. 495. But see

Willis v. Long Island R. Co., 34 N. Y. 670; and as to riding on the platform of a street car, *Meesel v. Lynn & B. R. Co.*, 8 Allen, 234; *Wills v. Lynn & B. R. Co.*, 129 Mass. ; *Brennan v. Fair Haven & W. R. Co.*, 45 Conn. 284; *Thirteenth & F. Sts. R. Co. v. Boudron*, 10 Reporter, 156.

⁴ *Forsyth v. Boston & A. R. Co.*, 103 Mass. 510; *Frost v. Grand Trunk R. Co.*, 10 Allen, 387. But see *Hulbert v. New York Cent. R. Co.*, 40 N. Y. 145.

⁵ *Bancroft v. Boston & W. R. Co.*, 97 Mass. 275.

⁶ *Baltimore City Pass. R. Co. v. Wilkinson*, 30 Md. 224. See *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370.

⁷ *Nichols v. Middlesex R. Co.*, 106 Mass. 463; *Chicago W. D. R. Co. v. Mills*, 91 Ill. 39.

⁸ *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439; *Robertson v. New York & E. R. Co.*, 22 Barb. 91.

⁹ *Penn. R. Co. v. Langdon*, 37 Leg. Int. 172.

¹⁰ *Beers v. Housatonic R. Co.*, 19 Conn. 566, 569.

¹¹ *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 663; *Beers v. Housatonic R. Co.*, 19 Conn. 566; *Park v. O'Brien*, 23 Conn. 347; *Commonwealth v. Fitchburg R. Co.*, 10 Allen, 189; *Wheelock v. Boston*

but another mode of expressing the same rule to say that if the facts are capable of different interpretations, or are so complicated that the general knowledge and experience of men do not at once condemn a person's conduct as negligent, the jury, and not the court, must determine the conclusion to be drawn from them.¹ If the inference of the defendant's negligence cannot be legitimately made from the plaintiff's evidence, the court will order a nonsuit.²

The common knowledge and experience of jurors, their acquaintance with the affairs of life, and with the general conduct and motives of men acting under different conditions, are specially called into request in determining questions of negligence.³ Therefore, where the facts are conceded, the question what men of ordinary care would, according to common experience, do under the circumstances, or whether the plaintiff and the defendant exercised ordinary care,⁴ or whether conduct which generally

& A. R. Co., 105 Mass. 203; *Ireland v. Oswego, H., & S. Plank R. Co.*, 13 N. Y. 526, 533; *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 38, 39, 39 N. Y. 61; *Wolfkiel v. Sixth Av. R. Co.*, 38 N. Y. 49; *Hackford v. New York Cent. & H. R. R. Co.*, 53 N. Y. 654, 43 How. Pr. 222; *Belton v. Baxter*, 58 N. Y. 411, 54 N. Y. 245; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451; *Thurber v. Harlem, B., M., & F. R. Co.*, 60 N. Y. 326; *Massoth v. Del. & H. C. Co.*, 64 N. Y. 524; *Bernhard v. Rensselaer & S. R. Co.*, 1 Abbott Ct. App. 131, 32 Barb. 165, 19 How. Pr. 199; *Keller v. New York Cent. R. Co.*, 2 Abbott Ct. App. 480, 24 How. Pr. 172, 177, 17 How. Pr. 102; *McGrath v. Hudson River R. Co.*, 32 Barb. 144, 1 Thomp. & C. 243; *Mahar v. Grand Trunk R. Co.*, 19 Hun, 32; *Ginnon v. New York & H. R. R. Co.*, 3 Rob. (N. Y.) 25; *Barratt v. Third Av. R. Co.*, 1 Sweeny, 568; *Northern Cent. R. Co. v. State*, 29 Md. 420, 440; *Baltimore & O. R. Co. v. Shipley*, 31 Md. 368; *Baltimore & O. R. Co. v. State*, 36 Md. 366; *Penn. R. Co. v. Barnett*, 59 Pa. St. 259; *Johnson v. Bruner*, 61 Pa. St. 58; *McKee v. Bidwell*, 74 Pa. St. 218; *Crissey v. Hestonville, M., & F. Pass R. Co.*, 75 Pa. St. 83; *Phil. & R. R. Co. v. Killips*, 88 Pa. St. 405; *Marietta & C. R. Co. v. Picksley*, 24 Ohio St. 654;

Cleveland, C., & C. R. Co. v. Crawford, 28 Ohio St. 631; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627, 24 Ohio St. 642; *Huelsenkamp v. Citizens' R. Co.*, 34 Mo. 45; *Carrington v. Ficklin*, 32 Gratt. 670; *Hawker v. Balt. & O. R. Co.*, 15 W. Va. 628; *Union Pacific R. Co. v. Rollins*, 5 Kan. 167, 181; *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447; *Solen v. Virginia & T. R. Co.*, 13 Nev. 106, 145; *Kansas Pacific R. Co. v. Twombly*, 3 Col. 125.

¹ *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208, 212; *Leonard v. New York Cent. & H. R. R. Co.*, 42 N. Y. Superior, 225.

² *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 198, L. R. 2 C. P. Div. 125; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, 433, 29 N. Y. 315, 33 Barb. 503; *Sutton v. New York Cent. & H. R. R. Co.*, 66 N. Y. 243. See *Bridges v. North London R. Co.*, L. R. 7 H. L. 213.

³ *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 664; *Solen v. Virginia & T. R. Co.*, 13 Nev. 106, 153.

⁴ *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45; *Cumberland & P. R. Co. v. State*, 37 Md. 156; *Gaynor v. Old Colony & L. R. Co.*, 100 Mass. 21; *Chaffee v. Boston & L. R. Co.*, 104 Mass. 108; *Wheelock v. Boston & A. R. Co.*, 105 Mass. 203; *French v. Taunton Branch*

is deemed negligence showed under certain qualifying circumstances ordinary care,¹ is for the jury.

The measure of ordinary care being variable, so that acts and omissions which under some circumstances are negligence are not under others, the question of negligence—that is, what was the duty, and whether there has been a performance or breach—becomes peculiarly a function for the jury, and the court can but rarely declare a particular act to be conclusive evidence of negligence.²

The court will order a nonsuit, or withdraw a case from the jury, not on a mere preponderance of evidence, but only where a verdict upon it would be so unsupported by evidence as to require it to be set aside.³ If there is no proof of the defendant's negligence, it is error to submit the question to the jury.⁴ To sus-

R. Co., 116 Mass. 537; *Bayley v. Eastern R. Co.*, 125 Mass. 62; *Linnehan v. Sampson*, 126 Mass. 506; *Bernhard v. Rensselaer & S. R. Co.*, 1 Abbott Ct. App. 131, 32 Barb. 165, 19 How. Pr. 199; *Sheridan v. Brooklyn City & N. R. Co.*, 36 N. Y. 39; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451; *Thurber v. Harlem, B., M., & F. R. Co.*, 60 N. Y. 326; *Phil. & R. R. Co. v. Spearen*, 47 Pa. St. 300; *Penn. R. Co. v. Barnett*, 59 Pa. St. 259; *Kay v. Penn. R. Co.*, 65 Pa. St. 269, 274; *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311; *Beers v. Housatonic R. Co.*, 19 Conn. 566; *Walters v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 71, 36 Iowa, 458; *Kennayde v. Pacific R. Co.*, 45 Mo. 255.

¹ *Bonnell v. Delaware, L., & W. R. Co.*, 10 Vroom, 189, 192; *Solen v. Virginia & T. R. Co.*, 13 Nev. 106, 145; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208, 212; *Mayo v. Boston & M. R.*, 104 Mass. 137.

² *State v. Manchester & L. R. Co.*, 52 N. H. 528, 563; *Northern Cent. R. Co. v. State*, 29 Md. 420, 438; *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 32, 45; *McMahon v. Northern Cent. R. Co.*, 39 Md. 438, 451; *Phil. & R. R. Co. v. Spearen*, 47 Pa. St. 300; *North Penn. R. Co. v. Heileman*, 49 Pa. St. 63; *Penn. R. Co. v. Barnett*, 59 Pa. St. 259; *Penn. Canal Co. v. Bentley*, 66 Pa. St. 30; *West Chester & P. R. Co. v. McElwee*, 67 Pa. St. 311; *McKee v. Bidwell*, 74 Pa. St. 218; *Crissey v. Hestonville, M., & F. Pass. R. Co.*, 75

Pa. St. 83; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Galena & C. U. R. Co. v. Dill*, 22 Ill. 264; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313.

³ *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208, 212; *Mayo v. Boston & M. R.*, 104 Mass. 137, 142; *Bayley v. Eastern R. Co.*, 125 Mass. 62; *Commonwealth v. Fitchburg R. Co.*, 10 Allen, 189; *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451; *Baxter v. Second Av. R. Co.*, 3 Rob. (N. Y.) 510; *Watkins v. Atlantic Av. R. Co.*, 20 Hun, 237; *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447, 453; *Langhoff v. Mil. & P. R. Co.*, 19 Wis. 489, 23 Wis. 43; *Redding v. South Carolina R. Co.*, 3 S. C. n. s. 1; *Bridges v. North London R. Co.*, L. R. 7 H. L. 213, L. R. 6 Q. B. 377. See *Thrings v. Central Park R. Co.*, 7 Rob. (N. Y.) 616.

⁴ *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298; *Penn. R. Co. v. Barnett*, 59 Pa. St. 259; *Commonwealth v. Boston & W. R. Co.*, 101 Mass. 201; *Flint v. Norwich & W. R. Co.*, 110 Mass. 222; *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9; *Bulger v. Albany R. Co.*, 42 N. Y. 459; *Harty v. Central R. Co.*, 42 N. Y. 468; *Keeley v. Erie R. Co.*, 47 How. Pr. 256; *Schultz v. Pacific R. Co.*, 36 Mo. 13; *Maher v. Atlantic & P. R. Co.*, 64 Mo. 267; *Louisville & P. C. Co. v. Murphy*, 9 Bush, 522; *Daniel v. Metropolitan R. Co.*, L. R. 5 H. L. 45, L. R. 3 C. P. 216, 591; *Welfare v. London & B. R. Co.*, L. R. 4 Q. B. 693; *Lewis v. London, C.*,

tain the verdict, a *scintilla* of evidence is not enough, but proof of well-defined negligence is required.¹ A nonsuit will be ordered where there is no evidence of the plaintiff's due care, the burden of proof to show such care being on him.²

Nonsuits in actions, the gist of which is negligence, are granted generally at the close of the plaintiff's case, on the ground that his negligence by his own showing contributed to the injury; but such contributory negligence must clearly appear to justify the nonsuit.³ When it so appears, the defendant's negligence becomes immaterial.⁴ A nonsuit may be ordered where the plaintiff's negligence appears by the allegations of his complaint.⁵ It

& D. R. Co., L. R. 9 Q. B. 66; *Stubley v. London & N. W. R. Co.*, L. R. 1 Exch. 13; *Dublin, W., & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155, Ir. R. 8 C. L. 531, Ir. R. 10 C. L. 256.

¹ *Cotton v. Wood*, 8 C. B. N. s. 568; *Toomey v. London, B., & S. C. R. Co.*, 3 C. B. N. s. 146; *Kearney v. London & B. & S. C. R. Co.*, L. R. 6 Q. B. 759; *Butterfield v. Western R. Co.*, 10 Allen, 532; *Commonwealth v. Fitchburg R. Co.*, 10 Allen, 189, 192; *Brooks v. Somerville*, 106 Mass. 271; *State v. Phil., W., & B. R. Co.*, 47 Md. 76; *Boland v. Mo. R. Co.*, 36 Mo. 484; *Howard Express Co. v. Wile*, 64 Pa. St. 201; *Phil. & R. R. Co. v. Yerger*, 73 Pa. St. 121.

² *Cordell v. New York Cent. & H. R. R. Co.*, 75 N. Y. 330, 70 N. Y. 119, 64 N. Y. 535; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 256.

³ *Steves v. Oswego & S. R. Co.*, 18 N. Y. 422, 425; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 5 Duer, 21; *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9; *Maginnis v. New York Cent. & H. R. R. Co.*, 52 N. Y. 215; *Hackford v. New York Cent. R. Co.*, 53 N. Y. 654; *Belton v. Baxter*, 58 N. Y. 411, 54 N. Y. 245; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 411; *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 248; *Mas-soth v. Del. & H. C. Co.*, 64 N. Y. 524; *Cordell v. New York Cent. & H. R. R. Co.*, 75 N. Y. 330, 70 N. Y. 119, 64 N. Y. 535; *Haring v. New York & E. R. Co.*, 13 Barb. 9; *Sheffield v. Rochester & S. R. Co.*, 21 Barb. 339; *Robinson v. New York Cent. & H. R. R. Co.*, 65 Barb. 146; *Borst v. Lake Shore & M. S. R. Co.*,

4 Hun, 346; *Bernhard v. Rensselaer & S. R. Co.*, 1 Abbott Ct. App. 131, 32 Barb. 165, 19 How. Pr. 199, 23 How. Pr. 166; *Waldele v. New York Cent. & H. R. R. Co.*, 19 Hun, 69; *Central R. Co. v. Moore*, 4 Zab. 824, 268; *New Jersey Express Co. v. Nichols*, 3 Vroom, 166, 4 Vroom, 434; *New Jersey R. & T. Co. v. West*, 4 Vroom, 430; *Penn. R. Co. v. Matthews*, 7 Vroom, 531; *Delaware, L., & W. R. Co. v. Toffey*, 9 Vroom, 525, 529; *Bonnell v. Del., L., & W. R. Co.*, 10 Vroom, 189; *Warren v. Fitchburg R. Co.*, 8 Allen, 227, 230; *Allyn v. Boston & A. R. Co.*, 105 Mass. 77; *Brooks v. Somerville*, 106 Mass. 271; *Milwaukee & C. R. Co. v. Hunter*, 11 Wis. 160; *Langhoff v. Mil. & P. R. Co.*, 19 Wis. 489, 23 Wis. 43; *Roth v. Mil. & St. P. R. Co.*, 21 Wis. 256; *Donaldson v. Mil. & St. P. R. Co.*, 21 Wis. 293; *Delaney v. Mil. & St. P. R. Co.*, 33 Wis. 67, 72; *Haas v. Chicago & N. W. R. Co.*, 41 Wis. 44, 50; *Murphy v. Chicago, R. I., & P. R. Co.*, 45 Iowa, 661, 38 Iowa, 539; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99, 120; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 296; *McMahon v. Northern Cent. R. Co.*, 39 Md. 438, 450; *McKee v. Bidwell*, 74 Pa. St. 218; *Cogswell v. Oregon & C. R. Co.*, 6 Oreg. 417; *Bunting v. Central Pacific R. Co.*, 14 Nev. 351; *Cohen v. Eureka & P. R. Co.*, 14 Nev. 376; *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447; *Ellis v. Great Western R. Co.*, L. R. 9 C. P. 551.

⁴ *Harper v. Erie R. Co.*, 3 Vroom, 88.

⁵ *Goldstein v. Chicago, M., & St. P. R. Co.*, 46 Wis. 404; *Jeffersonville, M., & I. R. Co. v. Goldsmith*, 47 Ind. 43.

may be ordered when the evidence of both parties is in as well as at the close of the plaintiff's case.¹ The court will direct a verdict for the defendant for the same reasons as would justify a nonsuit;² but the direction will be erroneous if there was evidence to sustain a verdict for the plaintiff.³

Setting aside of Verdict.—The court will set aside a verdict where there was no evidence of the defendant's negligence;⁴ or where the plaintiff's negligence clearly appears to have contributed to the injury;⁵ or where the verdict cannot be reconciled with undisputed facts;⁶ or where, there being no substantial conflict as to the testimony, the verdict is against the evidence.⁷ The court will set aside a verdict which is clearly against the weight of evidence,⁸ but not one which is only against the mere preponderance of evidence.⁹ It will only interfere where the verdict is so contrary to the evidence as to show the adoption of a wrong principle, misapprehension of evidence, or the action of prejudice, or some improper influence.¹⁰ It is peculiarly a function of the jury to pass upon the credibility of witnesses; but

¹ *Field v. New York Cent. R. Co.* 32 N. Y. 339, 350.

² *Gahagan v. Boston & L. R. Co.*, 1 Allen, 187; *Clark v. Boston & A. R. Co.*, 128 Mass. 1; *Starry v. Dubuque & S. W. R. Co.*, 51 Iowa, 419.

³ *Craig v. New York, N. H., & H. R. Co.*, 118 Mass. 431.

⁴ *Commonwealth v. Boston & W. R. Co.*, 101 Mass. 201; *Elkins v. Boston & A. R. Co.*, 115 Mass. 190.

⁵ *Langhoff v. Mil. & P. R. Co.*, 23 Wis. 43; *Sheffield v. Rochester & S. R. Co.*, 21 Barb. 339; *Suydam v. Grand St. & N. R. Co.*, 41 Barb. 375; *Moore v. Central R. Co.*, 4 Zab. 268, 824; *Telfer v. Northern R. Co.*, 1 Vroom, 188; *Morris & E. R. Co. v. Haslan*, 4 Vroom, 147; *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 805; *Whitney v. Maine Cent. R. Co.*, 69 Me. 208.

⁶ *Payne v. Chicago, R. I., & P. R. Co.*, 39 Iowa, 523.

⁷ *Robinson v. Western Pacific R. Co.*, 48 Cal. 409, 423.

⁸ *Telfer v. Northern R. Co.*, 1 Vroom, 188; *Bonnell v. Del., L., & W. R. Co.*, 10 Vroom, 189, 192; *Cheney v. New York Cent. & H. R. R. Co.*, 16 Hun, 415;

Sutherland v. New York Cent. & H. R. R. Co., 41 N. Y. Superior, 17; *Chicago, B., & Q. R. Co. v. Hazzard*, 26 Ill. 373, 388; *Toledo, W., & W. R. Co. v. Harmon*, 47 Ill. 298; *Chicago & N. W. R. Co. v. Ryan*, 70 Ill. 211; *Chicago, B., & Q. R. Co. v. Rosenfeld*, 70 Ill. 272; *Chicago, B., & Q. R. Co. v. Lee*, 87 Ill. 454; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 186, 195; *Cleveland, C., C., & I. R. Co. v. Elliott*, 28 Ohio St. 340; *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 805; *Whitney v. Maine Cent. R. Co.*, 69 Me. 208.

⁹ *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Chicago, B., & Q. R. Co. v. Gregory*, 58 Ill. 272; *Chicago, R. I., & P. R. Co. v. Austin*, 69 Ill. 426; *Madison & I. R. Co. v. Taffe*, 37 Ind. 361; *Indianapolis & V. R. Co. v. McClaren*, 62 Ind. 566; *Evansville & C. R. Co. v. Smith*, 65 Ind. 92; *Macon & W. R. Co. v. Davis*, 27 Ga. 113; *Kansas Pacific R. Co. v. Twombly*, 3 Col. 125.

¹⁰ *Daley v. Norwich & W. R. Co.*, 26 Conn. 591; *Meyer v. Pacific R. Co.*, 40 Mo. 151; *Chicago City R. Co. v. Young*, 62 Ill. 238.

even here it has not an absolute discretion. The court will interfere if it disregards the testimony of unimpeached witnesses, or the rules of law in weighing evidence.¹ The granting of motions to set aside verdicts as against evidence, or for newly discovered evidence, depends much on circumstances and sound judicial discretion.² The court is reluctant to set aside successive concurrent verdicts, but will exercise the power where they are manifestly against the evidence.³

Instructions to be definite, pertinent, and consistent. — Although the question of negligence is one of fact for the jury, the court should keep in view a distinct definition of negligence as applicable to the case on trial.⁴ Abstract propositions should not be stated in the charge without such explanations as will enable the jury to apply them;⁵ but a party can take advantage of this objection only when he requests more specific instructions.⁶ Statements of law should not be made to the jury when there is no evidence to which they apply.⁷ The instructions, where the evidence is conflicting, should be accurate, complete, and consistent.⁸ They must not assume controverted facts as proved.⁹ A verdict will be set aside where the instructions in one part state the law correctly, and in another incorrectly.¹⁰

Allegation of Negligence. — The declaration need not allege the plaintiff's exercise of care;¹¹ but some authorities require this alle-

¹ *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74; *Chicago, B., & Q. R. Co. v. Stumps*, 55 Ill. 387; *St. Louis, A., & T. H. R. Co. v. Manly*, 58 Ill. 300; *Seibert v. Erie R. Co.*, 49 Barb. 583.

² *Barrett v. Third Av. R. Co.*, 45 N. Y. 628.

³ *Carlin v. Chicago, R. I., & P. R. Co.*, 37 Iowa, 316; *Russ v. Steamboat War Eagle*, 14 Iowa, 363; *Lunt v. London & N. W. R. Co.*, L. R. 1 Q. B. 277.

⁴ *Bridges v. North London R. Co.*, L. R. 7 H. L. 213, 221, L. R. 6 Q. B. 377.

⁵ *Marietta & C. R. Co. v. Picksley*, 24 Ohio St. 654; *Baltimore & O. R. Co. v. Whittaker*, 24 Ohio St. 642; *Muldowney v. Ill. Cent. R. Co.*, 32 Iowa, 176; *Chicago, B., & Q. R. Co. v. Van Patten*, 64 Ill. 510, 74 Ill. 91.

⁶ *Northern Cent. R. Co. v. State*, 29 Md. 420, 441.

⁷ *Kennedy v. North Mo. R. Co.*, 36 Mo. 351; *McKeon v. Citizens' R. Co.*, 42 Mo. 79; *Pittsburg, Ft. W., & C. R. Co. v. Slusser*, 19 Ohio St. 157; *Chicago, R. I., & P. R. Co. v. Austin*, 69 Ill. 426; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177.

⁸ *Chicago City R. Co. v. Freeman*, 6 Brad. (Ill.) 608; *Stratton v. Central City R. Co.*, 12 Chicago Leg. News, 357.

⁹ *Walters v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 71, 36 Iowa, 458.

¹⁰ *Chicago, B., & Q. R. Co. v. Payne*, 49 Ill. 499; *Pendleton St. R. Co. v. Stallman*, 22 Ohio St. 1.

¹¹ *Hocum v. Weitherick*, 22 Minn. 152; *Louisville & P. C. Co. v. Murphy*, 9 Bush, 522; *Robinson v. Western Pacific R. Co.*, 48 Cal. 409; *State v. Manchester &*

gation, or a statement of facts from which his exercise of such care will appear.¹ Where negligence generally is charged, proof of any degree of negligence may be shown.² The particulars in which the negligence consisted need not be set forth.³

Negligence of the Injured Person. Contributory Negligence.—The obligation to use ordinary care, so as to avoid receiving injury as well as to avoid inflicting it, governs the relation of all who are exercising independent rights. One who by the breach of this duty has shared in bringing an injury upon himself cannot complain of another, who, by a breach of the corresponding duty, has also shared in producing it. In an action for negligence, two conditions must concur, — a performance of duty by the plaintiff, and a breach of duty by the defendant. The more approved statement of the doctrine of contributory negligence is, that a person cannot recover for an injury to which he contributed by his own want of ordinary care.⁴

L. R. Co., 52 N. H. 528, 558; Hackford v. New York Cent. & H. R. Co., 43 How. Pr. 222, 53 N. Y. 654; Snyder v. Portsmouth, C., & St. L. R. Co., 11 W. Va. 14; Government St. R. Co. v. Hanlon, 53 Ala. 70; Baltimore & O. R. Co. v. Whittington, 30 Gratt. 805.

¹ Lalor v. Chicago, B., & Q. R. Co., 52 Ill. 401; Indianapolis & St. L. R. Co. v. Evans, 88 Ill. 63; Indianapolis, P., & C. R. Co. v. Keely, 23 Ind. 133; Jeffersonville, M., & I. R. Co. v. Hendricks, 41 Ind. 48; Jackson v. Indianapolis & St. L. R. Co., 47 Ind. 454.

² Penn. R. Co. v. Krick, 47 Ind. 368.

³ Ohio & M. R. Co. v. Selby, 47 Ind. 471.

⁴ Murphy v. Deane, 101 Mass. 455; Baltimore & P. R. Co. v. Jones, 95 U. S. 439; Beers v. Housatonic R. Co., 19 Conn. 566; Neal v. Gillett, 23 Conn. 437; Johnson v. Hudson River R. Co., 20 N. Y. 65, 73, 6 Duer, 633; Wilds v. Hudson River R. Co., 24 N. Y. 430, 29 N. Y. 315; Grippen v. New York Cent. R. Co., 40 N. Y. 34; Carroll v. New York & N. H. R. Co., 1 Duer, 571; Moore v. Central R. Co., 4 Zab. 268, 824; Runyon v. Central R. Co., 1 Dutcher, 556; Cleveland, C., & C. R. Co. v. Terry, 8 Ohio St. 570; Pendleton St. R. Co. v. Stallman, 22 Ohio St. 1; Cleveland, C., & C. & I. R. Co. v. Elliott, 28 Ohio St. 340, 352, 357;

Baltimore & O. R. Co. v. Whitacre, 35 Ohio St. 627, 24 Ohio St. 642; State v. Balt. & O. R. Co., 24 Md. 84, 104; Frech v. Phil., W., & B. R. Co., 39 Md. 574; Baltimore & O. R. Co. v. Whittington, 30 Gratt. 805, 815; Baltimore & O. R. Co. v. Sherman, 30 Gratt. 602; Richmond & D. R. Co. v. Anderson, 31 Gratt. 812; Reeves v. Del., L., & W. R. Co., 30 Pa. St. 454, 464; Harlan v. St. Louis, K. C., & N. R. Co., 65 Mo. 22, 64 Mo. 480; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Le Baron v. Joslin, 41 Mich. 313; Wright v. Ill. & M. T. Co., 20 Iowa, 195; Sherman v. Western Stage Co., 24 Iowa, 515; O'Keefe v. Chicago, R. I., & P. R. Co., 32 Iowa, 467; Conlin v. Chicago, R. I., & P. R. Co., 37 Iowa, 316; Murphy v. Chicago, R. I., & P. R. Co., 38 Iowa, 539; Lang v. Holiday Creek R. Co., 42 Iowa, 677; Government St. R. Co. v. Hanlon, 53 Ala. 70; Memphis & C. R. Co. v. Copeland, 61 Ala. 376; Memphis & C. R. Co. v. Whitfield, 44 Miss. 466, 485; Macon & W. R. Co. v. Johnson, 38 Ga. 409, 431; Nashville & C. R. Co. v. Carroll, 6 Heisk. 347; Toledo & W. R. Co. v. Goddard, 25 Ind. 185; Bellefontaine R. Co. v. Hunter, 33 Ind. 335, 356; Needham v. San Francisco & S. J. R. Co., 37 Cal. 409, 419; Robinson v. Western Pacific R. Co., 48 Cal. 409; Flemming v.

The terms "proximately,"¹ "directly,"² and "essentially"³ are sometimes used to qualify the term "contributed" in defining the negligence which defeats an injured person's right of action. They are used in such a connection either for emphasis, or to distinguish negligence at the time or place of the injury from conduct too remote to be regarded as a cause of the injury. The terms "concurred in"⁴ and "co-operated with"⁵ have been used as synonymous for "contributed to."

The injury, in order to be actionable, must be occasioned solely by the defendant's negligence, and not in any degree by the plaintiff's;⁶ and also, it has been said, "it must be a case of unmixed negligence to justify a recovery."⁷ These forms of expression are not incorrect, if by "negligence" is understood not the omission of all possible precautions, but the want of the ordinary care which is the duty of all.

The omission of precautions which did not contribute to the injury, or which are dictated only by extraordinary prudence, does not affect the plaintiff's right.⁸ The injured person is in

Western Pacific R. Co., 49 Cal. 253; *Deville v. Southern Pacific R. Co.*, 50 Cal. 383; *Hearne v. Southern Pacific R. Co.*, 50 Cal. 482; *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585; *Knight v. Pontchartrain R. Co.*, 23 La. An. 462; *Davies v. Mann*, 10 M. & W. 546; *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244; *Tuff v. Warman*, 5 C. B. N. s. 573, 585, 2 C. B. N. s. 740; *Radley v. London & N. W. R. Co.*, L. R. 1 App. Cas. 754.

¹ *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 277. See *post*, p. 326.

² *Cleveland, C., & C. R. Co. v. Terry*, 8 Ohio St. 570, 581; *Harlan v. St. Louis, K. C., & N. R. Co.*, 65 Mo. 22, 25, 64 Mo. 480; *State v. Balt. & O. R. Co.*, 24 Md. 84, 104; *Button v. Hudson River R. Co.*, 18 N. Y. 248, 250, 254; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 74; *Sherman v. Western Stage Co.*, 24 Iowa, 515, 554; *Gates v. B. C. R., & M. R. Co.*, 39 Iowa, 45; *Murphy v. Deane*, 101 Mass. 455, 466; *Tuff v. Warman*, 5 C. B. N. s. 573, 2 C. B. N. s. 740. See *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185, 197.

³ *Government St. R. Co. v. Hanlon*, 53 Ala. 70, 77. See *Sterling Bridge Co. v. Pearl*, 80 Ill. 251.

⁴ *Button v. Hudson River R. Co.*, 18 N. Y. 248, 251.

⁵ *Kerwhacker v. Cleveland, C., & C. R. Co.*, 3 Ohio St. 172, 195; *Murphy v. Deane*, 101 Mass. 455, 464.

⁶ *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 73; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, 433; *Spencer v. Utica & S. R. Co.*, 5 Barb. 337; *Brown v. Maxwell*, 6 Hill, 592, 593; *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409, 419; *Robinson v. Western Pacific R. Co.*, 48 Cal. 409, 421, 423; *Murphy v. Deane*, 101 Mass. 455, 464. The negligence of a third person contributing to the injury will not deprive the plaintiff of his right to recover as already seen, *ante*, p. 311.

⁷ *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185.

⁸ *State v. Manchester & L. R. Co.*, 52 N. H. 528, 552; *Beisiegel v. New York Cent. R. Co.*, 34 N. Y. 622, 628, 632; *Davis v. New York Cent. & H. R. R. Co.*, 47 N. Y. 400; *Ditherner v. Chicago, M., & St. P. R. Co.*, 47 Wis. 138; *Cleveland, C., & C. R. Co. v. Terry*, 8 Ohio St. 570, 581; *Cleveland, C., & C. R. Co. v. Crawford*, 24 Ohio St. 631, 638; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627, 24 Ohio St. 642; *Creed v. Penn. R. Co.*, 86 Pa. St. 139, 145; *Thirteenth & F. Sts. Pass. R. Co. v. Boudron*, 10 Reporter, 156.

default only when his negligence both amounts to a want of the ordinary care which men of common prudence practise under like conditions, and also contributes to the injury.¹ Thus, a person in crossing a track is required to use only the care which men of ordinary prudence use under like circumstances.²

Some authorities declare the rule of contributory negligence as follows: that the plaintiff's own negligence, which contributed to the injury, does not defeat his right of action, if the defendant might or could, by the exercise of ordinary care, have avoided it.³ This mode of statement negatives in effect the fundamental doctrine that the injured party cannot recover, if, by his failure to use ordinary care, he contributed to the injury. It is, perhaps, however, less objectionable in substance than in form, if applied only, as it usually is, to two classes of cases,—one where the plaintiff's negligence is so disconnected in time or place from the injury that it cannot be deemed to be the immediate cause of it, or in law to have contributed to it;⁴ and the other, where the company's servants, after discovering the plaintiff in a dangerous position, in which he has negligently or unlawfully placed himself, fail to use the means at their command to save him from harm.⁵ In the former class of cases the plaintiff's negligence is

¹ *Beers v. Housatonic R. Co.*, 19 Conn. 566, 571, 572; *Central R. Co. v. Moore*, 4 Zab. 268, 824; *Cook v. New York Cent. R. Co.*, 3 Keyes, 476, 479; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; *Manly v. Wil. & W. R. Co.*, 74 N. C. 655, 660; *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347.

² *Beisiegel v. New York Cent. R. Co.*, 34 N. Y. 622, 628; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; *Mackay v. New York Cent. R. Co.*, 35 N. Y. 75, 80; *Tucker v. Henniker*, 41 N. H. 317.

³ *Macon & W. R. Co. v. Davis*, 18 Ga. 679; *Central R. & B. Co. v. Davis*, 19 Ga. 437; *Trow v. Vt. Cent. R. Co.*, 24 Vt. 495; *Brown v. Hannibal & St. J. R. Co.*, 50 Mo. 461; *Karle v. Kansas City, St. J., & C. B. R. Co.*, 55 Mo. 476; *Meyers v. Chicago, R. I., & P. R. Co.*, 59 Mo. 223; *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486; *Tuff v. Warman*, 5 C. B. n. s. 573.

⁴ "The law in these cases of negligence is, as was said in the Court of Exchequer Chamber, perfectly well settled, and beyond dispute. The first proposition is a general one, to this effect: that

the plaintiff in an action for negligence cannot succeed, if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care, which contributed to cause the accident. But there is another proposition, equally well established, and it is a qualification upon the first; namely, that, though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet, if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." *Lord Penzance in Radley v. London & N. W. R. Co.*, L. R. 1 App. Cas. 754, 758, 759.

⁵ *Murphy v. Deane*, 101 Mass. 455, 463, 465, 466; *Whalen v. St. Louis, K. C., & N. R. Co.*, 60 Mo. 323; *Harlan v. St. Louis, K. C., & N. R. Co.*, 65 Mo. 22, 25, 64 Mo. 480; *Frick v. St. Louis, K. C., & N. R. Co.*, 5 Mo. App. 435; *State v. Manchester & L. R. Co.*, 52 N. H. 528, 556, 557; *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621, 638; *Zimmerman v. Hannibal & St. J.*

called remote, and is not admitted as a defence to the defendant's proximate negligence; and, in the latter class, the injury is of that wilful or wanton nature that it becomes a cause of action, irrespective of the plaintiff's conduct.

The rule of contributory negligence has been thus stated: that "mere negligence, or want of ordinary care or caution, will not disentitle the plaintiff to recover, unless it be such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened;"¹ or, eliminating negatives, that a plaintiff may recover, unless the misfortune could not have happened but for his own negligence. This formula is open to the objection that it admits the plaintiff's right of action where his fault might equal or even exceed the defendant's, and does not take into account that the plaintiff must establish his own care, as well as the defendant's negligence.²

Proximate and Remote Negligence. — The distinction has been taken between proximate and remote negligence. Where there has been mutual negligence, and the negligence of each was the proximate cause of the injury, or where the negligence of the plaintiff was proximate and that of the defendant remote, no action can be maintained; but the negligence of the defendant being proximate and that of the plaintiff remote, the defendant is liable.³

R. Co., 11 Cent. L. J. 96; *Lewis v. Balt. & O. R. Co.*, 38 Md. 588; *Murphy v. Chicago, R. I., & P. R. Co.*, 38 Iowa, 539, 45 Iowa, 661; *Morris v. Chicago, B., & Q. R. Co.*, 45 Iowa, 29; *Lang v. Holiday Creek R. & C. M. Co.*, 49 Iowa, 469; *Jacobs v. Louisville & N. R. Co.*, 10 Bush, 263.

¹ *Tuff v. Warman*, 5 C. B. n. s. 573, 585; *Scott v. Dublin & W. R. Co.*, 11 Irish C. L. 377, 394; *Northern Cent. R. Co. v. State*, 29 Md. 420; *Lewis v. Balt. & O. R. Co.*, 38 Md. 588, 589; *Frech v. Phil., W., & B. R. Co.*, 39 Md. 574; *State v. Manchester & L. R. Co.*, 52 N. H. 528, 554.

² In *Murphy v. Deane*, 101 Mass. 455, the case of *Tuff v. Warman*, *supra*, is critically treated. See *Manly v. Wilmington & W. R. Co.*, 74 N. C. 655, 658.

³ *Trow v. Vt. Cent. R. Co.*, 24 Vt. 494; *Kerwhacker v. Cleveland, C., & C. R. Co.*, 3 Ohio St. 172; *Cleveland, C., & C. R. Co.*

v. Elliott, 4 Ohio St. 474; *Pendleton St. R. Co. v. Stallman*, 22 Ohio St. 1, 20; *Button v. Hudson River R. Co.*, 18 N. Y. 248; *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393; *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409; *Robinson v. Western Pacific R. Co.*, 48 Cal. 409; *Hearne v. Southern Pacific R. Co.*, 50 Cal. 482; *Northern Cent. R. Co. v. State*, 29 Md. 420; *Northern Cent. R. Co. v. State*, 31 Md. 357; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *McMahon v. Northern Cent. R. Co.*, 39 Md. 438; *State v. Manchester & L. R. Co.*, 52 N. H. 528; *Richmond & D. R. Co. v. Anderson*, 31 Gratt. 812; *Pittsburg, Ft. W., & C. R. Co. v. Karns*, 13 Ind. 87; *Spencer v. Ill. Cent. R. Co.*, 29 Iowa, 55; *Gates v. B., C., & M. R. Co.*, 39 Iowa, 45; *Pacific R. Co. v. Houts*, 12 Kan. 328; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156, 193; *Galpin v. Chicago & N. W. R. Co.*, 19 Wis. 604;

The plaintiff's negligence is treated as remote where it preceded the injury in time, and was not directly related to it.¹ Such antecedent negligence may consist in placing himself or his property in an exposed or unlawful position; and, in such case, if he is not chargeable with any default contemporaneous with the injury, and contributory to it, the defendant's failure to use reasonable means in his power to prevent the injury is deemed the proximate cause of it.² There may, however, be contributory negligence, beginning earlier than the time of the injury, which will defeat a right of action.³

Conditions and Causes distinguished.—The terms—causes and conditions—have been used respectively to distinguish the negligent acts or omissions of a plaintiff which disentitle him to recover from those which do not have this effect. The exposed or illegal position in which a person voluntarily placed himself is, under some circumstances, regarded as the condition, and not the legal cause, of the injury.⁴ But the plaintiff cannot recover, if the trespass which he was at the time committing was an efficient cause of the injury.⁵

Chicago & A. R. Co. v. Becker, 76 Ill. 25; Manly v. Wil. & W. R. Co., 74 N. C. 655; Meyer v. People's R. Co., 43 Mo. 523; Kennayde v. Pacific R. Co., 45 Mo. 255; Karle v. Kansas City, St. J., & C. B. R. Co., 55 Mo. 476; Frick v. St. Louis, K. C., & N. R. Co., 5 Mo. App. 435; Meyer v. Lindell R. Co., 6 Mo. App. 27; Thirteenth & F. Sts. Pass. R. Co. v. Boudron, 10 Reporter, 156. Of the use of the terms "proximate" and "remote," in instructions to the jury, it has been said: "I own it appears to me that, to adopt a form of direction which would involve jurors in such a discussion as an ingenious advocate could raise upon the theory of causation, and the distinction between remote and proximate causes,—a subject which has perplexed metaphysicians from the days of the disquisitions of the schoolmen down to those of the essays of Hume and of Brown,—would not tend to convey clear and satisfactory instruction to men of plain understandings and of ordinary information. It is impossible to read the report of the discussion which took place on the argument of Tuff v. Warman (especially as reported in 5 Jurist,

n. s. p. 223), without perceiving the great inconvenience of a disquisition of that kind in a court of law." Scott v. Dublin & W. R. Co., 11 Ir. C. L. 377, 392, Pigot, C. B.

¹ Isbell v. New York & N. H. R. Co., 27 Conn. 393, 406; Murphy v. Deane, 101 Mass. 455.

² Isbell v. New York & N. H. R. Co., 27 Conn. 393, 406; Needham v. San Francisco & S. J. R. Co., 37 Cal. 409; Baltimore & O. R. Co. v. State, 33 Md. 542; Baltimore & O. R. Co. v. State, 36 Md. 366; Tanner v. Louisville & N. R. Co., 60 Ala. 621-638; Burham v. St. Louis & I. M. R. Co., 56 Mo. 338; Whalen v. St. Louis, K. C., & N. R. Co., 60 Mo. 323; Maher v. Atlantic & P. R. Co., 64 Mo. 267; Frick v. St. Louis, K. C., & N. R. Co., 5 Mo. App. 435; Davies v. Mann, 10 M. & W. 546.

³ Chicago & N. W. R. Co. v. Clark, 2 Brad. (Ill.) 116.

⁴ Wharton on Negligence, § 823; Bigelow on Torts, p. 307; Thirteenth & F. Sts. Pass. R. Co. v. Boudron, 10 Reporter, 156; White v. Lang, 128 Mass. 598.

⁵ O'Donnell v. Mo. Pacific R. Co., 7 Mo. App. 190.

Comparative Negligence.— In Illinois, a rule of comparative negligence, not likely to find favor elsewhere, has been affirmed in a number of decisions. It does not, according to the more recent statement, determine the liability in case of the negligence of both parties contributing to the injury by the mere fact that the negligence of one exceeds the other's; but it allows the plaintiff to recover where his negligence, though contributing to the injury, is slight, and that of the defendant is, in comparison with the plaintiff's, gross.¹

The Plaintiffs taking of Risks not necessarily Negligence.— The fact that the injured person did some act by which he incurred or increased danger does not necessarily involve negligence which will prevent recovery, where the danger was created by some wrongful act of the company. The question is for the jury whether he acted from wrongheadedness or as a prudent man would have done under the circumstances.² But he has no right to expose himself to danger upon a crossing although the

¹ *Chicago & R. I. R. Co. v. Still*, 19 Ill. 499; *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478; *Chicago, B., & Q. R. Co. v. Dewey*, 26 Ill. 255; *Chicago & A. R. Co. v. Ho-garth*, 38 Ill. 370; *Chicago, B., & Q. R. Co. v. Payne*, 49 Ill. 499; *Chicago & N. W. R. Co. v. Sweeny*, 52 Ill. 325; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Illinois Cent. R. Co. v. Maffit*, 67 Ill. 431; *Chicago, B., & Q. R. Co. v. Lee*, 68 Ill. 576; *Pittsburg, C., & St. L. R. Co. v. Knutson*, 69 Ill. 103; *Chicago & N. W. R. Co. v. Clark*, 70 Ill. 276; *Chicago & A. R. Co. v. Mock*, 72 Ill. 141; *Illinois Cent. R. Co. v. Hall*, 72 Ill. 222; *Rockford, R. I., & St. L. R. Co. v. Hillmer*, 72 Ill. 235; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347; *Illinois Cent. R. Co. v. Goddard*, 72 Ill. 567; *Chicago & N. W. R. Co. v. Coss*, 73 Ill. 394; *Chicago, B., & Q. R. Co. v. Van Patten*, 74 Ill. 91, 64 Ill. 510; *Indianapolis, B., & W. R. Co. v. Flanigan*, 77 Ill. 365; *Toledo, W., & W. R. Co. v. O'Connor*, 77 Ill. 391; *St. Louis, V., & T. H. R. Co. v. Dunn*, 78 Ill. 197; *Sterling Bridge Co. v. Pearl*, 80 Ill. 251; *Rockford, R. I., & St. L. R. Co. v. Delaney*, 82 Ill. 198; *Schmidt v. Chicago & N. W. R. Co.*, 83 Ill. 405; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Illinois Cent. R. Co. v. Hammer*, 85 Ill.

526; *Joliet v. Seward*, 86 Ill. 402; *Indianapolis & St. L. R. Co. v. Evans*, 88 Ill. 63; *Chicago, B., & Q. R. Co. v. Harwood*, 90 Ill. 425; *Wabash R. Co. v. Henks*, 91 Ill. 406; *East St. Louis, P., & P. Co. v. Hightower*, 92 Ill. 139; *Ohio & M. R. Co. v. Porter*, 92 Ill. 437; *Illinois Cent. R. Co. v. Patterson*, 93 Ill. 290; *Lake Shore & M. S. R. Co. v. Sunderland*, 2 Brad. (Ill.) 307; *Lake Shore & M. S. R. Co. v. Berlink*, 2 Brad. (Ill.) 427; *Chicago & A. R. Co. v. Langley*, 2 Brad. (Ill.) 505; *Chicago City R. Co. v. Lewis*, 5 Brad. (Ill.) 242; *Winchester v. Case*, 5 Brad. (Ill.) 486; *Wabash R. Co. v. Jones*, 5 Brad. (Ill.) 607. See *Holstine v. Oregon & C. R. Co.*, 8 Oreg. 163. For comments on this rule, see *O'Keefe v. Chicago, R. I., & P. R. Co.*, 32 Iowa, 467; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 278.

² *Clayards v. Dethick*, 12 Q. B. 439; *Thompson v. North Eastern R. Co.*, 2 Best & S. 106; *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45; *Penn. R. Co. v. Werner*, 89 Pa. St. 59; *Bernhard v. Rensselaer & S. R. Co.*, 1 Abbott Ct. App. 131; *Twomley v. Central Park, N., & E. R. R. Co.*, 69 N. Y. 158. But see *O'Mara v. Del. & H. C. Co.*, 18 Hun, 192.

company has failed to build it in a manner required by its agreement with him.¹

It is not necessarily contributory negligence in a traveller, who is put in imminent peril by the company's default, to leap from his carriage, although by remaining in it he would have escaped without injury. If he does what a person of ordinary prudence, acting under the natural human instincts of self-preservation, would have done under the circumstances, his error of judgment is not culpable.² Nor is it contributory negligence for a person to undertake to save the life of another, who is in peril from the negligence of the company, where there is any reasonable prospect of saving it. "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons."³

The Plaintiff's Conduct as affected by the Direction or Invitation of the Company's Servants. — The direction or invitation or assurance of safety given by a servant of the company may so qualify a plaintiff's act as to relieve it of the quality of negligence which it would otherwise have. This has been held more generally in the case of passengers who are in the charge of the company, and have a right to assume that its servants know what is safe; but it is held also in the case of persons who, having no relation of privity to the company, act upon the direction of its servants, as in passing over the track at highway crossings.⁴ But, notwithstanding such direction, invitation, or assurance, the plaintiff will not be excused in following it, if the act involves a reckless exposure of himself, or is one which a man of common prudence would not do.⁵

¹ *Artman v. Kansas Cent. R. Co.*, 22 Kan. 296.

² *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Voak v. Northern Cent. R. Co.*, 75 N. Y. 320; *Coulter v. American Merchants' Union Ex. Co.*, 56 N. Y. 585; *Cuyler v. Decker*, 20 Hun, 178; *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143, 155; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25; *Penn. R. Co. v. Werner*, 89 Pa. St. 59.

³ *Eckert v. Long Island R. Co.*, 43 N. Y. 502, 506; *Government St. R. Co. v. Hanlon*, 53 Ala. 70, 77, 78; *Linnehan v. Sampson*, 126 Mass. 506.

⁴ *Warren v. Fitchburg R. Co.*, 8 Allen, 227; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen, 368; *Wheelock v. Boston & A. R. Co.*, 105 Mass. 203, 207; *Bayley v. Eastern R. Co.*, 125 Mass. 62; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, 43 Barb. 532, 47 Barb. 515; *Lambeth v. North Carolina R. Co.*, 66 N. C. 494; *Bridges v. North London R. Co.*, L. R. 6 Q. B. 377, L. R. 7 H. L. 213; *Nicholson v. Lancashire & Y. R. Co.*, 3 Hurl. & C. 534; *ante*, Chap. X. p. 275.

⁵ *Pittsburg, C., & St. L. R. Co. v. Krouse*, 30 Ohio St. 222; *Chicago, B., & Q. R. Co. v. Sykes*, 1 Brad. (Ill.) 520, 11 Cent. L. J. 337; *Chicago, B., & Q. R.*

A mere permission from the company's servants to do a dangerous act does not relieve the injured person from responsibility for its consequences.¹

Injuries to Wrong-doers.—The company has no right to inflict wanton injury on persons who are unlawfully on its location; and where human life and limb are concerned, that injury may well be treated as wanton, subjecting the company to damages, when, although able to do so, they neglect to arrest the engine which they have good reason to believe will, without an effort to stop it, result in injury to the wrong-doer. A wrong-doer is not necessarily an outlaw as to his property; still less as to his person.²

The company, except at crossings established at law, has the exclusive right to its track at all times. It is not required to anticipate the intrusion of wrong-doers. A person entering without right on the company's track, does so at his peril, and cannot recover for injuries suffered by him in a collision with its engines, except when it inflicts them intentionally or wantonly.³ Its duty to trespassers is only the negative one, — not to act maliciously or with an obvious disregard of consequences.⁴ It is not required for their safety to use the most approved machinery and contrivances.⁵ It is not liable, where no evil intent or wanton conduct appears, for injuries to intruders who undertake to use its track for some business purpose of their own,⁶ or to persons who are

Co. v. Hazzard, 26 Ill. 373; *Ginnon v. New York & H. R. Co.*, 3 Rob. (N. Y.) 25.

¹ *Hickey v. Boston & L. R. Co.*, 14 Allen 429.

² *Gillis v. Penn. R. Co.*, 59 Pa. St. 129; *Evansville & C. R. Co. v. Lowdermilk*, 15 Ind. 120; *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102; *Lafayette & I. R. Co. v. Adams*, 26 Ind. 76; *Penn. R. Co. v. Sinclair*, 62 Ind. 301; *Spofford v. Harlow*, 3 Allen, 176; *Lovett v. Salem & S. D. R. Co.*, 9 Allen, 557; *Rounds v. Delaware, L., & W. R. Co.*, 64 N. Y. 129, 3 Hun, 329, 5 Thomp. & C. 475; *McCarty v. Delaware & H. C. Co.*, 17 Hun, 74.

³ *Little Schuylkill Nav., R., & C. Co. v. Norton*, 24 Pa. St. 465; *Phil. & R. R. Co. v. Hummell*, 44 Pa. St. 375; *Pittsburg, Ft. W., & C. R. Co. v. Evans*, 53 Pa. St. 250; *Mulherrin v. Del., L., &*

W. R. Co., 81 Pa. St. 366; *Pittsburg, Ft. W., & C. R. Co. v. Collins*, 87 Pa. St. 405; *Terre Haute & I. R. Co. v. Graham*, 46 Ind. 239; *Jeffersonville, M., & I. R. Co. v. Goldsmith*, 47 Ind. 43; *Illinois Cent. R. Co. v. Hall*, 72 Ill. 222; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Robertson v. New York & E. R. Co.*, 22 Barb. 91; *McKenna v. New York Cent. & H. R. R. Co.*, 8 Daly, 304; *McCarty v. Del. & H. C. Co.*, 17 Hun, 74; *Kansas Pacific R. Co. v. Ward*, 4 Col. 30; *Rothe v. Mil. & St. P. R. Co.*, 21 Wis. 256.

⁴ *Johnson v. Boston & M. R.*, 125 Mass. 75; *Morrissey v. Eastern R. Co.*, 126 Mass. 377.

⁵ *McKenna v. New York Cent. & H. R. R. Co.*, 8 Daly, 304, 10 N. Y. Week. Dig. 223.

⁶ *Little Schuylkill Nav., R., & C. Co.*

unlawfully walking or remaining upon or crossing its tracks.¹ Some authorities, however, treat such intrusion as only remote negligence, and hold the company liable for injury to the intruder where it could have avoided it by the exercise of ordinary care at the time of the injury.²

The company's servants may ordinarily presume that a person, apparently of full age and capacity, who is walking on the track at some distance before the engine, will leave it in time to save himself from harm;³ or, if approaching the track, that he will stop, if it becomes dangerous for him to cross it.⁴ This presumption will not be justified under some circumstances, as when the person who is on the track appears to be intoxicated, asleep, or otherwise off his guard,⁵ or has the charge of a loaded team which he is unable to move.⁶ Whatever favor some authorities give to trespassers, none of them require the company to use any means to prevent injury to them which would imperil the safety of persons on the trains.⁷

A person who enters by a license on the company's location is not a trespasser.⁸ But a mere naked license or permission to use

v. Norton, 24 Pa. St. 465; *Heil v. Glanding*, 42 Pa. St. 493; *Phil. & R. R. Co. v. Spearen*, 47 Pa. St. 300, 305. See *Patterson v. Phil. W., & B. R. Co.*, 4 Houst. 103.

¹ See cases cited *ante*, p. 330, notes 3, 4, 5, and p. 316, note 4.

² *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; *Patterson v. Phil. W., & B. R. Co.*, 4 Houst. 103; *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393, 404, 405; *Murphy v. Chicago, R. I., & P. R. Co.*, 38 Iowa, 539, 45 Iowa, 661; *Baltimore & O. R. Co. v. State*, 36 Md. 366; *Richmond & D. R. Co. v. Anderson*, 31 Gratt. 812; *Brown v. Hannibal & St. J. R. Co.*, 50 Mo. 461; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; *Hicks v. Pacific R. Co.*, 64 Mo. 430; *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409; *Kansas Pacific R. Co. v. Cranmer*, 4 Col. 524.

³ *Telfer v. Northern R. Co.*, 1 Vroom, 188, 204; *Frech v. Phil. W., & B. R. Co.*, 39 Md. 574; *Terre Haute & I. R. Co. v. Graham*, 46 Ind. 239; *Indianapolis & V. R. Co. v. McClaren*, 62 Ind. 566; *Chicago, B., & Q. R. Co. v. Lee*, 68 Ill. 576; *Chicago, R. I., & P. R. Co. v. Austin*, 69 Ill.

426; *Toledo, W., & W. R. Co. v. Jones*, 76 Ill. 311; *Chicago, B., & Q. R. Co. v. Damerell*, 81 Ill. 450; *Mobile & M. R. Co. v. Blakely*, 59 Ala. 471; *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621; *Cogswell v. Oregon & C. R. Co.*, 6 Oreg. 417; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 279, 280. See *Bemis v. Conn. & P. R. R. Co.*, 42 Vt. 375, 382.

⁴ *Chicago, R. I., & P. R. Co. v. Austin*, 69 Ill. 426.

⁵ *Herring v. Wil. & R. R. Co.*, 10 Ired. 402; *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621, 646; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 279, 280.

⁶ *Chicago & A. R. Co. v. Hogarth*, 38 Ill. 370; *St. Louis, A., & T. H. R. Co. v. Manly*, 58 Ill. 300; *Card v. New York & H. R. Co.*, 50 Barb. 39.

⁷ *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409.

⁸ *Patterson v. Phil. W., & B. R. Co.*, 4 Houst. 103; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347; *Harty v. Central R. Co.*, 42 N. Y. 468. As to notices against trespasses the observance of which is not enforced, see *Dublin v. Wicklow, W., & W. R. Co. v. Slaterry*, L. R. 3 App. Cas. 1155.

the track does not impose new obligations on the company in the management of its trains, and persons who act upon it do so at their peril.¹ When so using the track they should exercise superior vigilance.² A servant is rightfully on the track when engaged there in the line of his duty.³ Children of tender years are not treated strictly as trespassers when, indulging natural childish instincts, they stray upon the track.⁴ A person who comes upon the track in an emergency, as to recover his hat which has been carried there by the wind,⁵ or who, being unable from the darkness to distinguish the track, wanders upon it from the highway at night,⁶ or who steps upon and crosses over the platform of a street-railway car which is stopping on the street and obstructing the passage,⁷ is not a trespasser.

Negligence of Children and Disabled Persons.—It has been a question, leading to much contention, whether the same conduct which in a person of full age and capacity would be negligence, excluding him from redress for the consequences of the negligence of others, is in a child of tender years, still under the dominion of childish instincts, or in a blind or deaf, crippled or insane person, to have the same effect; or whether a less degree of care, proportioned to their capacity, is all that is required of such disabled persons. The doctrine now quite generally accepted is, that the care required of a child is only such as is to be expected from one of his maturity and discretion. If he exercises such care, he may recover for an injury caused by the negligence of another, although a person of full age and capacity, acting in like manner, might be chargeable with contributory negligence, which would be fatal to his right of action.⁸

¹ *Nicholson v. Erie R. Co.*, 41 N.Y. 526; *Sutton v. New York Cent. & H. R. R. Co.*, 66 N.Y. 243; *Matze v. New York Cent. & H. R. R. Co.*, 1 Hun, 417; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Jeffersonville, M., & I. R. Co. v. Goldsmith*, 47 Ind. 43; *Terre Haute & I. R. Co. v. Graham*, 46 Ind. 239; *Hickey v. Boston & L. R. Co.*, 14 Allen, 429, 433. But see *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347; *Barrett v. Midland R. Co.*, 1 Foster & F. 361.

² *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585.

³ *Steele v. Central R. Co.*, 43 Iowa, 109.

⁴ *Kay v. Penn. R. Co.*, 65 Pa. St. 269; *Penn. R. Co. v. Lewis*, 79 Pa. 33; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; *Hicks v. Pacific R. Co.*, 64 Mo. 430; *Lygo v. Newbold*, 9 Exch. 302.

⁵ *Bernhard v. Rensselaer & S. R. Co.*, 1 Abbott Ct. App. 131.

⁶ *Baltimore & O. R. Co. v. Boteler*, 38 Md. 568.

⁷ *Shea v. Sixth Av. R. Co.*, 62 N.Y. 180.

⁸ *Robinson v. Cone*, 22 Vt. 213; *Birge v. Gardiner*, 19 Conn. 507; *Neal v. Gillett*, 23 Conn. 487; *Daley v. Norwich & W. R.*

The doctrine of imputable negligence was at one time adhered to in New York,¹ and was adopted in some other States.² This doctrine regarded the negligence of the parents or protector of a child in allowing him to be placed in an exposed position as the child's own negligence, giving it the same effect, even when the suit was brought by the child, as if he had been a person of full age and capacity and voluntarily exposed himself. The courts of

Co., 26 Conn. 591; *Bronson v. Southbury*, 37 Conn. 199; *Washington & G. R. Co. v. Gladman*, 15 Wall. 401; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 2 Dill. 294; *Rauch v. Lloyd*, 31 Pa. St. 358; *Penn. R. Co. v. Kelly*, 31 Pa. St. 372; *Phil. & R. R. Co. v. Spearen*, 47 Pa. St. 300; *Smith v. O'Connor*, 48 Pa. St. 218; *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Glasse v. Hestonville, M., & F. Pass. R. Co.*, 57 Pa. St. 172; *North Penn. R. Co. v. Mahoney*, 57 Pa. St. 187; *Kay v. Penn. R. Co.*, 65 Pa. St. 269; *Flower v. Penn. R. Co.*, 69 Pa. St. 210; *Pittsburg, A., & M. R. Co. v. Caldwell*, 74 Pa. St. 421; *Crissey v. Hestonville, M., & F. Pass. R. Co.*, 75 Pa. St. 83; *Phil. & R. R. Co. v. Long*, 75 Pa. St. 257; *Phil. City Pass. R. Co. v. Hassard*, 75 Pa. St. 367; *State v. Balt. & O. R. Co.*, 24 Md. 84, 103; *Baltimore & O. R. Co. v. State*, 30 Md. 47; *McMahon v. Northern Cent. R. Co.*, 39 Md. 488; *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534; *Chicago, B., & Q. R. Co. v. Dewey*, 26 Ill. 255; *Kerr v. Fargue*, 54 Ill. 482; *Chicago & A. R. Co. v. Murray*, 71 Ill. 601; *Weick v. Lander*, 75 Ill. 93; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25, 84 Ill. 483; *Rockford, R. I., & St. L. R. Co. v. Delaney*, 82 Ill. 198; *Boland v. Mo. R. Co.*, 36 Mo. 484; *O'Flaherty v. Union R. Co.*, 45 Mo. 70; *Donoho v. Vulcan Iron Works*, 7 Mo. App. 447; *Schmidt v. Mil. & St. P. R. Co.*, 23 Wis. 186; *Walters v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 71, 36 Iowa, 458; *McMillan v. Burlington & M. R. Co.*, 46 Iowa, 231; *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 455; *Daniels v. Clegg*, 28 Mich. 32, 41; *Lynch v. Smith*, 104 Mass. 52; *Elkins v. Boston & A. R. Co.*, 115 Mass. 190; *Costello v. Syracuse, B., & N. Y. R. Co.*, 65 Barb. 92; *Mowrey v. Cent. City R. Co.*, 66 Barb. 43, 51 N. Y.

666; *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 248, 2 Thomp. & C. 644; *Haycroft v. Lake Shore & M. S. R. Co.*, 2 Hun, 489, 64 N. Y. 636; *Thurber v. Harlem B., M., & F. R. Co.*, 60 N. Y. 326; *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417; *Casey v. New York Cent. & H. R. R. Co.*, 6 Abbott N. C. 104, 78 N. Y. 518.

¹ *Hartfield v. Roper*, 21 Wend. 615; *Brown v. Maxwell*, 6 Hill, 592; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349, 359; *Willets v. Buffalo & R. R. Co.*, 14 Barb. 585; *Lehman v. Brooklyn*, 29 Barb. 234; *Burke v. Broadway & S. Av. R. Co.*, 49 Barb. 529; *Flynn v. Hatton*, 43 How. Pr. 333, 4 Daly, 552; *Honegsberger v. Second Av. R. Co.*, 1 Keyes, 570; *Jetter v. New York & H. R. Co.*, 2 Abbott Ct. App. 458; *Bulger v. Albany R. Co.*, 42 N. Y. 459; *Thurber v. Harlem B., M., & F. R. Co.*, 60 N. Y. 326; *Harris v. Uebelhoefer*, 75 N. Y. 161. See *Costello v. Syracuse, B., & N. Y. R. Co.*, 65 Barb. 92.

² *Pittsburg, Ft. W., & C. R. Co. v. Vining*, 27 Ind. 513; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Jeffersonville, M., & I. R. Co. v. Bowen*, 40 Ind. 545; *Hathaway v. Toledo, W., & W. R. Co.*, 46 Ind. 25; *Louisville & P. C. Co. v. Murphy*, 9 Bush, 522; *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Leslie v. Lewiston*, 62 Me. 468; *Bannon v. Balt. & O. R. Co.*, 24 Md. 108, 125. In Massachusetts, the cases at first followed *Hartfield v. Roper*, *supra*; *Holly v. Boston Gas Light Co.*, 8 Gray, 123, 132; *Wright v. Malden & M. R. Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; but later decisions in that State require of the child only the care which is to be expected from one of his age and capacity. *Lynch v. Smith*, 104 Mass. 52; *Elkins v. Boston & A. R.*, 115 Mass. 190.

New York, while not formally overruling the earlier decisions, now conform substantially to the general view which requires of the child only the care which his maturity and capacity admit, or at least limit the earlier statement of the law to quite young children unattended, and usually not older than five years, who are of an age when they ought not to be trusted with the care of themselves, and whose parents are chargeable with negligence in allowing them to be abroad.¹ On the other hand, the English decisions, which at first corresponded with the general American doctrine,² seem now to support the rule which was at first held in New York.³

The distinction has been taken that, while the negligence of parents and guardians in allowing infants, who are of such tender years as to need supervision and attendance when abroad, to go into the street unattended, is to have the same effect in defeating an action for injury to them as if they were adults, children who have passed that period are to be held responsible for only a degree of care proportionate to their age and maturity.⁴ But many authorities reject the doctrine of imputable negligence altogether.⁵

The conduct of the company in the case of children and disabled persons exposed to danger must be adapted to the circumstances. What would be ordinary care in regard to a person whom it supposed competent to take care of himself, would not fulfil the requirement in regard to a child of tender years, or of a person physically or mentally incapable of seeing and escaping danger, and known to be thus disabled. It may be presumed that an adult, apparently of sound mind and body, who is on the track or approaching it, will remove from it or stop in time to

¹ *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455, 36 Barb. 230; *Ihl v. Forty-Second St. R. Co.*, 47 N. Y. 317; *Mowrey v. Central City R. Co.*, 66 Barb. 43, 51 N. Y. 666; *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 248, 2 Thomp. & C. 644; *Casey v. New York Cent. & H. R. R. Co.*, 6 Abbott N. C. 104, 8 Daly, 220, 78 N. Y. 518; *Haycroft v. Lake Shore & M. S. R. Co.*, 2 Hun, 489, 64 N. Y. 636; *Bryant v. Altenbrand*, 9 N. Y. Week. Dig. 475; *Davis v. New York, N. H., & H. R. Co.*, 9 N. Y. Week. Dig. 522. See *Harris v. Uebelhoefer*, 75 N. Y. 169.

² *Lynch v. Nurdin*, 1 Q. B. 29.

³ *Lygo v. Newbold*, 9 Exch. 302;

Waite v. North Eastern R. Co., El., Bl. & El. 719; *Singleton v. Eastern Counties R. Co.*, 7 C. B. n. s. 287; *Hughes v. Macfie*, 2 Hurl. & C. 744; *Mangan v. Atterton*, L. R. 1 Exch. 239.

⁴ *Holly v. Boston Gas Light Co.*, 8 Gray, 123; *Wright v. Malden & M. R. Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; *Brown v. European & N. A. R. Co.*, 58 Me. 384; *Thurber v. Harlem B., M., & F. R. Co.*, 60 N. Y. 326.

⁵ *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 455; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Walters v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 71.

escape injury from an advancing train,¹ but such a presumption would not be justified in the case of a young child, or of a person known to be insane, or intoxicated, or disabled in body. The omission to arrest the train in the former case would not be negligence, whereas in the latter it would be a wanton disregard of human life not to do so.² If, however, a person is conscious of some physical infirmity, he should supplement it by greater caution,³ and it is for the jury to say whether he used a degree of care commensurate with the circumstances, including his lack of vision.⁴

The rule that the traveller approaching a track must use his senses vigilantly and look both ways, is not applied to infants of tender years.⁵ But this precaution should be required of children who have maturity and capacity which justify their being allowed to go abroad unattended, or to take charge of infants who have not attained such maturity and capacity.⁶

The company is not liable for injuries to a child straying upon its track where it is not chargeable with negligence, as when the child could not be seen in time to stop the engine, or came suddenly upon the track unobserved;⁷ or brought the injury upon

¹ *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Telfer v. Northern R. Co.*, 1 Vroom, 188, 204; *Frech v. Phil. W.*, & B. R. Co., 39 Md. 574; *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447; *Herring v. Wil. & R. R. Co.*, 10 Ired. 402; *Poole v. North Carolina R. Co.*, 8 Jones (N. C.), 340; *Illinois Cent. R. Co. v. Hutchinson*, 47 Ill. 408; *St. Louis, A., & T. H. R. Co. v. Manly*, 58 Ill. 300; *Clayard v. Dethick*, 12 Q. B. 439, 445.

² *Willetts v. Buffalo & R. R. Co.*, 14 Barb. 585; *Sheridan v. Brooklyn, C., & N. R. Co.*, 36 N. Y. 39; *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; *Kenyon v. New York Cent. & H. R. R. Co.*, 5 Hun, 479; *Colt v. Sixth Av. R. Co.*, 33 N. Y. Superior, 189; *Chicago, B., & Q. R. Co. v. Dewey*, 26 Ill. 255; *Cleveland, C., & C. R. Co. v. Terry*, 8 Ohio St. 570; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Phil. & R. R. Co. v. Spearen*, 47 Pa. St. 300, 304; *Robinson v. Cone*, 22 Vt. 213, 225; *Daniels v. Clegg*, 28 Mich. 32, 41.

³ *Gonzales v. New York & H. R. Co.*, 33 N. Y. Superior, 57, 38 N. Y. 440, 1 Sweeny, 506, 6 Rob. (N. Y.) 93; *Cleveland, C., & C. R. Co. v. Terry*, 8 Ohio St. 570;

Central R. Co. v. Feller, 84 Pa. St. 226; *Cogswell v. Oregon & C. R. Co.*, 6 Oreg. 417; *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102.

⁴ *Harris v. Uebelhoefer*, 75 N. Y. 169.

⁵ *Chicago & A. R. Co. v. Becker*, 84 Ill. 483, 76 Ill. 25; *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417.

⁶ *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670, 18 Ohio St. 399; *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35.

⁷ *Phil. & R. R. Co. v. Hummell*, 44 Pa. St. 375; *Phil. & R. R. Co. v. Spearen*, 47 Pa. St. 300; *Phil. & R. R. Co. v. Long*, 75 Pa. St. 257; *Morrissey v. Eastern R. Co.*, 126 Mass. 377; *Bulger v. Albany R. Co.*, 42 N. Y. 459; *McKenna v. New York Cent. & H. R. R. Co.*, 10 N. Y. Week. Dig. 223, 8 Daly, 304; *Frick v. St. Louis, K. C., & N. R. Co.*, 5 Mo. App. 435; *Manly v. Wilmington & W. R. Co.*, 74 N. C. 655; *Schwier v. New York Cent. & H. R. R. Co.*, 15 Hun, 572; *Meyer v. Midland Pacific R. Co.*, 2 Neb. 319; *Citizens' St. R. W. Co. v. Carey*, 56 Ind. 396; *Walters v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 71. See *Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534.

himself by a sudden and unanticipated act;¹ or threw himself rashly on its draws or other works;² or being on the track and appearing to be leaving it in time to escape injury was prevented by some accident, as by falling into a crevice.³

The company is not required to keep a guard on its cars to prevent young children from getting upon or under them,⁴ or from loosing brakes so that the car moves down a grade and runs over them.⁵ A street-car company is not required to supply special contrivances, as fenders, to prevent young children coming on the car while it is passing.⁶

If the child, though young, is capable of the care and discretion required of an adult, the rule applicable to adults is to be applied to him.⁷ If he has sufficient intelligence to know the danger he has incurred, his negligence will defeat a recovery.⁸ If he is capable of taking care of himself, his parents are not negligent in allowing him to be abroad.⁹

It is the duty of the company to stop a train in order to avoid injury to a child of tender years who has strayed upon it, where the child shows no purpose to move from it in time to avoid danger.¹⁰ It is chargeable with negligence where its servants did not see him, but with proper attention might have seen him.¹¹ Whether it was the duty of the driver of a street car to stop the car when a child is approaching the street is for the jury.¹²

Injuries to Children from Dangerous Machinery.—The company may incur liability for injuries to children, by leaving dangerous

¹ *Hestonville Pass. R. Co. v. Connell*, 88 Pa. St. 520.

² *Brown v. European & N. A. R. Co.*, 58 Me. 384.

³ *Penn. R. Co. v. Morgan*, 82 Pa. St. 134; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25.

⁴ *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265; *Chicago, B. & Q. R. Co. v. Stumps*, 69 Ill. 409. But see *Pittsburg, A. & M. Pass. R. Co. v. Caldwell*, 74 Pa. St. 421; *Phil. City Pass. R. Co. v. Hassard*, 75 Pa. St. 367.

⁵ *Central Branch U. P. R. Co. v. Henigh*, 23 Kan. 347.

⁶ *Hestonville Pass. R. Co. v. Connell*, 88 Pa. St. 520.

⁷ *Ewen v. Chicago & N. W. R. Co.*, 88 Wis. 613; *McMahon v. New York*, 83 N. Y. 642; *Ihl v. Forty-Second St. & G. St.*

F. R. Co., 47 N. Y. 317; *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 248, 2 T. & C. 644; *Ostertag v. Pacific R. Co.*, 64 Mo. 421; *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35.

⁸ *Haas v. Chicago & N. W. R. Co.*, 41 Wis. 44.

⁹ *Barksdull v. New Orleans & C. R. Co.*, 23 La. An. 180; *Karr v. Parks*, 40 Cal. 188; *Pittsburg, Ft. W., & C. R. Co. v. Bumstead*, 48 Ill. 221.

¹⁰ *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; *Walters v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 71, 76.

¹¹ *Thurber v. Harlem B., M., & F. R. Co.*, 60 N. Y. 326; *Bahrenburgh v. Brooklyn City, H. P., & P. P. R. Co.*, 56 N. Y. 652.

¹² *Phil. City Pass. R. Co. v. Henrice*, 37 Leg. Int. 135, 9 Reporter, 689.

machinery where it is accessible to them, although it would not, under the same circumstances, be liable to an adult. Thus, where it leaves upon its unenclosed premises a turn-table, unfastened and unguarded, it has been held that the temptation which it thus offers to the natural instincts of children is equivalent to an invitation and allurement, and it is liable for injuries resulting from its want of ordinary care in preventing their access to such machinery;¹ and the same rule has been applied where it left an excavation in the highway unguarded.² It is not, however, liable for injuries to boys caused by their meddling with a turn-table which is isolated from places of public resort,³ or by their meddling with the brakes of a car which is stationary on a descending grade.⁴ It has been held liable for an injury to a young child who was brought by its parent to a place near the track where the company allowed the public to cross, and afterwards strayed on the track, where he was struck by an engine which came on a down grade without a brakeman.⁵

Special Obligations to Children.—A failure to fence the track, although the fence was primarily designed to prevent cattle straying upon it, has been held to be competent proof of negligence in an action for injury to a child straying upon the track.⁶

The courts, pressed by humane considerations, have been at times disposed to treat the company as the guardian and protector of children coming upon its carriages or premises, and to hold it bound as well to exercise physical control over them as to give them advice and warning.⁷

¹ *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657; *Keffe v. Mil. & St. P. R. Co.*, 21 Minn. 207; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686, 18 Kan. 34; *Koons v. St. Louis & I. M. R. Co.*, 65 Mo. 592; *Whirley v. Whiteman*, 1 Head, 610; *Mulaney v. Spence*, 15 Abbott Pr. n. s. 319; *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332; *Birge v. Gardiner*, 19 Conn. 507; *Lane v. Atlantic Works*, 111 Mass. 186, 107 Mass. 104. But see *Hughes v. Macfie*, 2 Hurl. & C. 744; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Hargreaves v. Deacon*, 25 Mich. 1.

² *Hagan's Case*, 5 Dill. 96.

³ *St. Louis, V., & T. H. R. Co. v. Bell*, 81 Ill. 76.

⁴ *Central Branch U. P. R. Co. v. Henigh*, 23 Kan. 347.

⁵ *Kay v. Penn. R. Co.*, 65 Pa. St. 269.

⁶ *Schmidt v. Mil. & St. P. R. Co.*, 23 Wis. 186; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475; *Williams v. Great Western R. Co.*, L. R. 9 Exch. 157. But see *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425, 5 Hun, 165, where the fence act was held to be designed only for the protection of cattle and passengers on trains, but not for that of travelers on the highway.

⁷ *Pittsburg, A., & M. Pass. R. Co. v. Caldwell*, 74 Pa. St. 421; *Phil. City Pass. R. Co. v. Hassard*, 75 Pa. St. 367; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503; *Hicks v. Pacific R. Co.*, 64 Mo. 430; *Brennan v. Fair Haven & W. R. Co.*, 45 Conn. 284.

Effect of Parents' Negligence. — The negligence of parents in allowing children of tender years to wander unattended upon a track is contributory negligence which will defeat an action by the parent for loss of service, or under statutes providing a remedy for the relatives of persons killed by negligence, except where the defendant's act is wilful.¹ The parent is not necessarily negligent where a young child goes abroad suddenly and unobserved, and puts himself in a dangerous place; and it is a question for the jury whether the parent exercised due care.² The fact that parents have not the pecuniary means to provide a constant attendant for children has been considered in some cases as bearing upon the question of their contributory negligence.³ If the parent or protector is personally present, controlling the movements of the child, his negligence will defeat an action for an injury to the child in like manner as if he suffered the injury himself.⁴

Effect of Directions to Infants and Youths. — Words in the form of command or direction, spoken by the company's servants to an infant or youth, may have the legal effect of force, when they would not have that effect if addressed to an adult.⁵

Negligence of the Child or of its Parents a Question for the Jury. — Whether the injured child exercised the care and discretion which

¹ *Pittsburg, Ft. W., & C. R. Co. v. Vining*, 27 Ind. 512; *Jeffersonville, M., & I. R. Co. v. Bowen*, 40 Ind. 545, 49 Ind. 154; *Evansville & C. R. Co. v. Wolf*, 59 Ind. 89; *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670, 18 Ohio St. 399; *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613; *Chicago v. Starr*, 42 Ill. 174; *Hund v. Geier*, 72 Ill. 393; *Toledo, W., & W. R. Co. v. Grable*, 88 Ill. 441; *Glassey v. Hestonville, M., & F. Pass. R. Co.*, 57 Pa. St. 172; *Pittsburg, A., & M. R. Co. v. Pearson*, 72 Pa. St. 169; *Penn. R. Co. v. Lewis*, 79 Pa. St. 33; *Smith v. Hestonville, M., & F. Pass. R. Co.*, 37 Leg. Int. 95, 10 Cent. L. J. 272; *Wright v. Malden & M. R. Co.*, 4 Allen, 283. But see *Government St. R. Co. v. Hanlon*, 53 Ala. 70, 82.

² *Pittsburg, A., & M. R. Co. v. Pearson*, 72 Pa. St. 169; *Kay v. Penn. R. Co.*, 65 Pa. St. 269; *Phil. & R. R. Co. v. Long*, 75 Pa. St. 257; *Wright v. Malden & M. R. Co.*, 4 Allen, 283, 288; *Pittsburg, Ft. W., & C. R. Co. v. Bumstead*, 48 Ill. 221; *Man-*

gam v. Brooklyn R. Co., 38 N. Y. 455; *Prendegast v. New York Cent. & H. R. R. Co.*, 58 N. Y. 652; *Fallon v. Central Park, N., & E. R. R. Co.*, 64 N. Y. 13; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475, 483.

³ *Walters v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 71, 78; *O'Flaherty v. Union R. Co.*, 45 Mo. 70; *Kay v. Penn. R. Co.*, 65 Pa. St. 269; *Pittsburg, A., & M. R. Co. v. Pearson*, 72 Pa. St. 169; *Phil. & R. R. Co. v. Long*, 75 Pa. St. 257; *Chicago v. Major*, 18 Ill. 349; *Pittsburg, Ft. W., & C. R. Co. v. Bumstead*, 48 Ill. 221; *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226.

⁴ *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Kay v. Penn. R. Co.*, 65 Pa. St. 269, 276, 277; *Waite v. North Eastern R. Co.*, El. Bl. & E. 719.

⁵ *Lovett v. Salem & S. D. R. Co.*, 9 Allen, 557; *Kline v. Central Pacific R. Co.*, 37 Cal. 400.

might reasonably be expected of him; whether his parents were negligent in allowing him to go into the street unattended, or in not preventing his escape into it; or whether the attendant was a person of sufficient discretion to have the charge of him,—are questions for the jury.¹

- ¹ *Lovett v. Salem & S. D. R. Co.*, 9 Allen, 557; *Mulligan v. Curtis*, 100 Mass. 512; *Lynch v. Smith*, 104 Mass. 52; *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236; *Hunt v. Salem*, 121 Mass. 294; *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310, 3 E. D. Smith, 103; *Drew v. Sixth Av. R. Co.*, 26 N. Y. 49; *Mangam v. Brooklyn Cent. R. Co.*, 38 N. Y. 455; *Downs v. New York Cent. R. Co.*, 47 N. Y. 83; *Ihl v. Forty-Second St. R. Co.*, 47 N. Y. 317; *Cosgrove v. Ogden*, 49 N. Y. 255; *Prendegast v. New York Cent. & H. R. R. Co.*, 58 N. Y. 652; *Fallon v. Central Park, N., & E. R. R. Co.*, 64 N. Y. 13; *Haycroft v. Lake Shore & M. S. R. Co.*, 64 N. Y. 636, 2 Hun, 489; *Jetter v. New York & H. R. Co.*, 2 Abbott Ct. App. 458; *Bryant v. Altenbrand*, 9 N. Y. Week. Dig. 475; *Davis v. New York, N. H., & H. R. Co.*, 9 N. Y. Week. Dig. 522; *Karr v. Parks*, 40 Cal. 188; *Schierhold v. North Beach & M. R. Co.*, 40 Cal. 447; *Chicago v. Major*, 18 Ill. 349; *Pittsburg, Ft. W., & C. R. Co. v. Bumstead*, 48 Ill. 221; *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226; *Pittsburg, A., & M. R. Co. v. Pearson*, 72 Pa. St. 169; *Penn. R. Co. v. Lewis*, 79 Pa. St. 33.

CHAPTER XII.

INJURIES TO TRAVELLERS ON THE HIGHWAY.

Injuries where the Company and the Injured Person are each exercising a Legal Right without any Relation between them arising from Contract. — In the case of collisions between the company's engines and persons crossing the track in carriages or on foot at the intersection of highways, each is exercising an equal legal right, independent of any contract or favor extended by the one to the other. The individual has a right to cross the track, and the company has a right to cross the highway. This is not, on the one hand, the case of a passenger to whom the company's liability is governed by an implied contract to use the highest degree of skill and diligence ; or, on the other, of a wrong-doer unlawfully on the track, and having no claim but for wanton injury. Nor is it the case of a servant who is presumed to take the risks incident to his employment. It is the case of two parties holding equal, independent rights, the exercise of which by one may result in injury to the other, with or without legal liability, according to the conduct of each. The duty of each under such conditions, in conformity with the principles of natural justice and municipal law, is to use ordinary care in the exercise of his own right to avoid injury to the other. If, notwithstanding such care by both parties, an injury happens, it is a misfortune which must be borne by the sufferer alone.¹

The peculiar motive power and implements of a railroad company require a kind of skill, a degree of vigilance, and a class of precautions adapted to them ; but the measure of its duty and liability, in relation to persons lawfully crossing or entering on its track, is the same as that which defines the duty and liability of the owners of carriages which are driven on the highway, or of other parties exercising independent rights. It is bound to use

¹ Indiana Cent. R. Co. v. Hudelson, 13 Ind. 325, 328.

ordinary care to avoid injury to travellers on the highway crossing its track ; and, acting through servants, as engineers, conductors, and brakemen, it is responsible for injuries to such travellers arising from a want of ordinary care and skill on the part of its servants,—that is, such care and skill as the mass of prudent persons in their business are accustomed to exercise.¹

Thus, in a leading case, which has been frequently cited with approval, it was considered that the highest diligence is not to be exacted of any person, except when a compensation is paid for the service ; or when the person injured is in the power and under the control of the defendant, as in the case of passengers in the charge of a common carrier ; or when the defendant officiously obtrudes his services upon the plaintiff, or is the only one of the two who is to derive a benefit from the act ; or is in the wrong place at the time he commits the injury, or engaged in an unlawful calling : but where both parties stand on an equality as to the means of avoiding the accident, and are each engaged in a lawful employment, only ordinary diligence can be required of either.²

It is sometimes said that railroad companies which use steam as motive power are required to exercise “the utmost care” to prevent injuries.³ This inexact mode of expression is used to enforce the duty of applying a vigilance and skill adapted to the peculiar dangers which are incident to the use of steam as a motive power, without intending to vary the measure of liability.⁴

But while the same rule of care and skill measures the liability

¹ *Beers v. Housatonic R. Co.*, 19 Conn. 566, 576 ; *Cleveland, C., & C. R. Co. v. Terry*, 8 Ohio St. 570 ; *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255 ; *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670, 676, 18 Ohio St. 399 ; *Pendleton St. R. Co. v. Stallmann*, 22 Ohio St. 1, 19 ; *State v. Balt. & O. R. Co.*, 24 Md. 84, 103 ; *Bannon v. Balt. & O. R. Co.*, 24 Md. 108, 121 ; *Baltimore & O. R. Co. v. Breinig*, 25 Md. 378 ; *Baltimore & O. R. Co. v. Bahrs*, 28 Md. 647 ; *Baltimore & O. R. Co. v. State*, 29 Md. 252 ; *New Orleans, J., & G. N. R. Co. v. Bailey*, 40 Miss. 395, 458, 459 ; *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, 441, 29 N. Y. 315 ; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451, 462 ; *Shaw v. Boston & W. R.*

Co., 8 Gray, 45 ; *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585 ; *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541 ; *Illinois Cent. R. Co. v. Phillips*, 55 Ill. 194, 49 Ill. 234 ; *Moore v. Cent. R. Co.*, 4 Zab. 268, 824 ; *Macon & W. R. Co. v. Davis*, 18 Ga. 679 ; *Zeigler v. Northeastern R. Co.*, 5 S. C. n. s. 221, 7 S. C. n. s. 402.
² *Brand v. Schenectady & T. R. Co.*, 8 Barb. 368.

³ *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 75 ; *Cook v. New York Cent. R. Co.*, 3 Keyes, 476, 479 ; *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209, 213. See *Baltimore & O. R. Co. v. Miller*, 29 Md. 252, 261.

⁴ *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451, 460-463.

of a railroad company as that of individuals, the consideration should be ever present to its agents and servants, that they are dealing with dangerous elements and forces, eminently destructive to human life and limb. Although bound to exercise only reasonable care and skill, except in the carriage of passengers, what will answer that requirement where there is little peril, will not where the peril is great. The care and skill, therefore, to be reasonable, must be proportioned to the danger and multiplied chances of injury; and similar precautions are required of persons who have occasion to be in the vicinity of its engines.¹

Mutual Obligations of the Company and the Traveller.—The obligations of the company and of the traveller are mutual and reciprocal, and the same degree of care to avoid a collision is incumbent on each. It is its duty to give the warnings required by statute, or in the exercise of reasonable care; and it is his duty to have his attention alive to them, and to heed them. The company, having a fixed place of movement and a peculiar momentum, has the right of precedence in crossing highways; and he must wait till the train, the coming of which he knows or ought to know, has passed.² The traveller has the right to assume that the company will exercise the care and take the precautions which the law imposes upon it.³

The company has a right of action over against a traveller on a highway for an injury to passengers arising from a collision caused by his negligence.⁴

¹ *Beers v. Housatonic R. Co.*, 19 Conn. 566; *Huyett v. Phil. & R. R. Co.*, 23 Pa. St. 373; *Runyon v. Central R. Co.*, 1 Dutcher, 556, 558; *Moshier v. Utica & S. R. Co.*, 8 Barb. 427; *Baltimore & O. R. Co. v. Breinig*, 25 Md. 378, 386; *Kennedy v. North Mo. R. Co.*, 36 Mo. 351; *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670, 676, 677, 18 Ohio St. 399; *Rockford, R. I., & St. L. R. Co. v. Byam*, 80 Ill. 528.

² *Continental Improvement Co. v. Stead*, 95 U. S. 161; *Chicago, B., & Q. R. Co. v. Lee*, 87 Ill. 454; *Harlan v. St. Louis, K. C., & N. R. Co.*, 65 Mo. 22; *Stillson v. Hannibal & St. J. R. Co.*, 67 Mo. 671, 676; *Black v. Burlington, C. R., & M. R. Co.*, 38 Iowa, 515; *Wilds v. Hudson River*

R. Co., 24 N. Y. 430, 440, 29 N. Y. 315; *Grippen v. New York Cent. R. Co.*, 40 N. Y. 34; *Warner v. New York Cent. R. Co.*, 44 N. Y. 465; *Adolph v. Central Park, N., & E. R. Co.*, 76 N. Y. 530, 65 N. Y. 554; *Telfer v. Northern R. Co.*, 1 Vroom, 188, 202, 203; *Morris & E. R. Co. v. Haslan*, 4 Vroom, 147; *Penn. R. Co. v. Matthews*, 7 Vroom, 531; *Whitney v. Maine Cent. R. Co.*, 69 Me. 208; *North Penn. R. Co. v. Heileman*, 49 Pa. St. 60; *Penn. R. Co. v. Goodman*, 62 Pa. St. 329; *Hall v. Brown*, 54 N. H. 495, 499, 58 N. H. 93.

³ *Robinson v. Western Pacific R. Co.*, 48 Cal. 409, 421.

⁴ *Chicago W. D. R. Co. v. Rend*, 6 Brad. (Ill.) 248.

Duty of the Traveller to use his Senses in order to avoid Danger. —

A traveller upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing, in order to avoid a collision. This precaution is dictated by common prudence. He should listen for signals, and look in the different directions from which a train may come. If by neglect of this duty he suffers injury from a passing train, he cannot recover of the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running at the time at a speed exceeding the legal rate.¹ This rule applies more strongly to a person who, with-

¹ *Steves v. Oswego & S. R. Co.*, 18 N. Y. 422; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315, 24 N. Y. 430, 440; *Gonzales v. New York & H. R. Co.*, 38 N. Y. 440; *Ernst v. Hudson River R. Co.*, 39 N. Y. 61, 35 N. Y. 9, 32 Barb. 159; *Wilcox v. Rome, W., & O. R. Co.*, 39 N. Y. 358; *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9; *Grippen v. New York Cent. R. Co.*, 40 N. Y. 34; *Baxter v. Troy & B. R. Co.*, 41 N. Y. 502; *Harty v. Central R. Co.*, 42 N. Y. 468; *Warner v. New York Cent. R. Co.*, 44 N. Y. 465, 469; *Gorton v. Erie R. Co.*, 45 N. Y. 660; *Davis v. New York Cent. & H. R. R. Co.*, 47 N. Y. 400; *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 248, 2 Thomp. & C. 644; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451, 67 N. Y. 587; *McGrath v. New York Cent. & H. R. R. Co.*, 59 N. Y. 468, 1 Hun, 437, 3 Thomp. & C. 776; *Mitchell v. New York Cent. & H. R. R. Co.*, 64 N. Y. 655; *Salter v. Utica & B. R. R. Co.*, 75 N. Y. 273, 13 Hun, 187; *Cordell v. New York Cent. & H. R. R. Co.*, 75 N. Y. 330, 70 N. Y. 119, 64 N. Y. 535; *Adolph v. Central Park, N., & E. R. R. Co.*, 76 N. Y. 530, 65 N. Y. 554; *Sheffield v. Rochester & S. R. Co.*, 21 Barb. 339; *Brooks v. Buffalo & N. F. R. Co.*, 25 Barb. 600; *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. 221; *Havens v. Erie R. Co.*, 53 Barb. 328; *Haight v. New York Cent. R. Co.*, 7 Lans. 11; *Elwood v. New York Cent. & H. R. R. Co.*, 4 Hun, 808; *Bunn v. Del., L., & W. R. Co.*, 6 Hun, 303; *Sutherland v. New York Cent. & H. R. R. Co.*, 41 N. Y. Superior, 17; *Chicago, R. I., & P. R. Co. v. Houston*, 95 U. S. 697; *Grows v. Maine Cent. R. Co.*, 67 Me. 100; *Butterfield v. Western R. Co.*, 10 Allen, 532; *Allyn v. Boston & A. R. Co.*, 105 Mass. 77; *Brooks v. Somerville*, 106 Mass. 271; *Blaker v. New Jersey Midland R. Co.*, 3 Stewart (N. J.), 240; *Lyman v. Phil., W., & B. R. Co.*, 4 Houst. 583; *Morris & E. R. Co. v. Haslan*, 4 Vroom, 147; *Reeves v. Del., L., & W. R. Co.*, 30 Pa. St. 454, 464; *North Penn. R. Co. v. Heileman*, 49 Pa. St. 60; *Penn. R. Co. v. Goodman*, 62 Pa. St. 329; *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35; *Baltimore & O. R. Co. v. Sherman*, 30 Gratt. 602, 629; *Bellefontaine & I. R. Co. v. Snyder*, 24 Ohio St. 670, 18 Ohio St. 399; *Cleveland, C. C., & I. R. Co. v. Elliott*, 28 Ohio St. 340; *Penn. R. Co. v. Rathgeb*, 32 Ohio St. 66; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627, 24 Ohio St. 642; *Chicago & R. I. R. Co. v. Still*, 19 Ill. 499; *Chicago & A. R. Co. v. Gretzner*, 46 Ill. 74, 82; *Chicago & N. W. R. Co. v. Sweeney*, 52 Ill. 325; *Chicago & A. R. Co. v. Jacobs*, 63 Ill. 178; *Chicago, R. I., & P. R. Co. v. Bell*, 70 Ill. 102; *Illinois Cent. R. Co. v. Goddard*, 72 Ill. 567; *Chicago, B., & Q. R. Co. v. Van Patten*, 74 Ill. 91, 64 Ill. 512; *Chicago & N. W. R. Co. v. Hatch*, 79 Ill. 137; *Chicago, B., & Q. R. Co. v. Harwood*, 80 Ill. 87; *Rockford, R. I., & St. L. R. Co. v. Byam*, 80 Ill. 528; *Chicago, B., & Q. R. Co. v. Damerell*, 81 Ill. 450; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Chicago & A. R. Co. v. Becker*, 84 Ill. 483; *Lake Shore & M. S. R. Co. v. Sunderland*, 2 Brad. (Ill.) 307; *Lake Shore & M. S. R. Co. v. Clemens*, 5 Brad. (Ill.) 77; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Toledo, W., & W. R. Co. v. Shuck-*

out right, is passing along and upon the track.¹ It requires the traveller to look not only for regular trains and those stated in time-tables, but as well for extra trains, or any trains behind time.²

The rule which requires the traveller to look both ways, up and down the track, and listen before crossing, while generally incumbent, and, if not complied with, defeating a recovery for an injury, is not applied inflexibly. He may be relieved of the duty by circumstances growing out of some personal disability; the condition of things at the crossing, as an obstructed view or unusual noise; or want of knowledge that he was near the crossing, under circumstances which excused his ignorance; or the blamable conduct of the company's servants.³ It is immaterial that

man, 50 Ind. 42; *St. Louis & S. E. R. Co. v. Mathias*, 50 Ind. 65; *Sinclair v. Penn. R. Co.*, 62 Ind. 301; *Artz v. Chicago, R. I., & P. R. Co.*, 34 Iowa, 153, 38 Iowa, 293, 44 Iowa, 284; *Carlin v. Chicago, R. I., & P. R. Co.*, 37 Iowa, 316, 31 Iowa, 370; *Benton v. Central R. Co.*, 42 Iowa, 192; *Lang v. Holiday Creek, R., & C. M. Co.*, 49 Iowa, 469; *Starry v. Dubuque & S. W. R. Co.*, 51 Iowa, 419; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 290, 291; *Haas v. Chicago & N. W. R. Co.* 41 Wis. 44; *Brown v. Mil. & St. P. R. Co.*, 22 Minn. 165; *Solen v. Virginia & T. R. Co.*, 13 Nev. 106; *Bunting v. Central Pacific R. Co.*, 14 Nev. 351; *Fletcher v. Atlantic & P. R. Co.*, 64 Mo. 484; *Leduke v. St. Louis & I. M. R. Co.*, 4 Mo. App. 485; *New Orleans, J., & G. N. R. Co. v. Mitchell*, 52 Miss. 808; *Zeigler v. North Eastern R. Co.*, 5 S. C. 221, 7 S. C. 402; *South & N. A. R. Co. v. Thompson*, 62 Ala. 494; *Flemming v. Western Pacific R. Co.*, 49 Cal. 253; *Northern Cent. R. Co. v. State*, 10 Reporter, 662; *Dublin, W., & W. R. Co. v. Slatery*, L. R. 3 App. Cas. 1155; *Ir. R. S. C. L. 531*, *Ir. R. 10 C. L. 256*; *Nicholls v. Great Western R. Co.*, 27 Upper Canada Q. B. 382.

¹ *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Lake Shore & M. S. R. Co. v. Hart*, 87 Ill. 529; *Michigan Cent. R. Co. v. Campau*, 35 Mich. 468.

² *Wilcox v. Rome, W., & O. R. Co.*, 39 N. Y. 358, 362; *Salter v. Utica & B. R. Co.*, 75 N. Y. 273, 13 Hun, 187; *Toledo, W., & W. R. Co. v. Jones*, 76 Ill. 311.

³ *Brown v. New York Cent. R. Co.*, 32 N. Y. 597; *Beisiegel v. New York Cent. R. Co.*, 34 N. Y. 622; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; *Mackay v. New York Cent. R. Co.*, 35 N. Y. 75, 27 Barb. 538; *Davis v. New York Cent. & H. R. R. Co.*, 47 N. Y. 400; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451; *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417; *Terry v. Jewett*, 78 N. Y. 338, 17 Hun, 395; *Casey v. New York Cent. & H. R. R. Co.*, 78 N. Y. 518, 6 Abbott N. C. 104; *Kellogg v. New York Cent. & H. R. R. Co.*, 79 N. Y. 72; *Leonard v. New York Cent. & H. R. R. Co.*, 42 N. Y. Superior, 225; *Warren v. Fitchburg R. Co.*, 8 Allen, 227; *Chaffee v. Boston & L. R. Co.*, 104 Mass. 108; *Wheelock v. Boston & A. R. Co.*, 105 Mass. 203; *Elkins v. Boston & A. R. Co.*, 115 Mass. 190; *French v. Taunton Branch R. Co.*, 116 Mass. 537; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Bonnell v. Del., L., & W. R. Co.*, 10 Vroom, 189; *Jewett v. Klein*, 12 C. E. Green, 550, 11 C. E. Green, 474; *Cleveland, C., & C. R. Co. v. Crawford*, 24 Ohio St. 631; *Marietta & C. R. Co. v. Picksley*, 24 Ohio St. 654; *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670, 18 Ohio St. 399; *Duffy v. Chicago & N. W. R. Co.*, 32 Wis. 269; *Eilert v. Green Bay, & C. R. Co.*, 10 Cent. L. J. 317; *Artz v. Chicago, R. I., & P. R. Co.*, 34 Iowa, 153; *Chicago, B., & Q. R. Co. v. Triplett*, 38 Ill. 482; *Chicago, B., & Q. R. Co. v. Lee*, 87 Ill. 454; *Bunting v. Central Pacific R. Co.*, 14 Nev. 351; *Cohen v. Eureka P. R. Co.*, 14 Nev. 376; *Chicago & N. W. R. Co. v. Whitton*, 13

the traveller did not look or listen, if by so doing he could not have seen or heard the coming train.¹ He is not, at least as a matter of law, required to lower the top of his carriage,² or leave it and go upon the track in order to obtain a better view.³ Nor is he required to take the view at a point close to the track, or to stop his carriage for the purpose of taking it, where common prudence does not require such precautions.⁴ The duty to look and listen has been held not incumbent on infants of tender years,⁵ or, according to some authorities, on laborers at work upon the track.⁶ It is not uniformly required of passengers leaving or taking trains at stations.⁷ But absent-mindedness is not a legal excuse for not taking the precaution.⁸ A traveller who attempts to cross or remain upon the track in the view of an approaching train does so at his peril; and, if he takes the risk, he must bear the consequences of his temerity.⁹

Wall. 270; *Stapley v. London, B., & S. C. R. Co.*, L. R. 1 Exch. 21; *Wanless v. North Eastern R. Co.*, L. R. 6 Q. B. 481, L. R. 7 H. L. 12.

¹ *Baxter v. Troy & B. R. Co.*, 41 N. Y. 502; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Brooks v. Buffalo & N. F. R. Co.*, 25 Barb. 600.

² *Stackus v. New York Cent. & H. R. R. Co.*, 79 N. Y. 464, 7 Hun, 559 (distinguishing *McCall v. New York Cent. R. Co.*, 54 N. Y. 642).

³ *Davis v. New York Cent. & H. R. R. Co.*, 47 N. Y. 400; *Mackay v. New York Cent. R. Co.*, 35 N. Y. 75; *Dolan v. Del. & H. C. Co.*, 71 N. Y. 285; *Duffy v. Chicago & N. W. R. Co.*, 32 Wis. 269.

⁴ *Renwick v. New York Cent. R. Co.*, 36 N. Y. 132; *Mackay v. New York Cent. R. Co.*, 35 N. Y. 75; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451, 457; *Kellogg v. New York Cent. & H. R. R. Co.*, 79 N. Y. 72; *Spencer v. Ill. Cent. R. Co.*, 29 Iowa, 55; *Richey v. Mo. Pacific R. Co.*, 7 Mo. App. 150.

⁵ *Chicago & A. R. Co. v. Becker*, 84 Ill. 483, 76 Ill. 25; *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417; *Powell v. New York Cent. & H. R. Co.*, 10 N. Y. Week. Dig. 503.

⁶ *Ominger v. New York Cent. & H. R. R. Co.*, 4 Hun, 159; *Bradley v. New York Cent. R. Co.*, 62 N. Y. 99. But see *Baltimore & O. R. Co. v. Whittington*, 30

Gratt. 805; *Chicago & N. W. R. Co. v. Sweeney*, 52 Ill. 325.

⁷ *Penn. R. Co. v. White*, 88 Pa. St. 327; *Terry v. Jewett*, 78 N. Y. 338, 17 Hun, 395.

⁸ *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 291; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627, 638.

⁹ *Wilds v. Hudson River R. Co.*, 29 N. Y. 315, 24 N. Y. 430; *Warner v. New York Cent. R. Co.* 44 N. Y. 465, 470; *Salter v. Utica & B. R. Co.*, 75 N. Y. 273, 13 Hun, 187; *Spencer v. Utica & S. R. Co.*, 5 Barb. 337; *Sheffield v. Rochester & S. R. Co.*, 21 Barb. 339; *Chicago, R. I., & P. R. Co. v. Houston*, 95 U. S. 697, 702; *Blaker v. New Jersey Midland R. Co.*, 3 Stewart (N. J.), 240; *Illinois Cent. R. Co. v. Buckner*, 28 Ill. 299; *Chicago, R. I., & P. R. Co. v. Bell*, 70 Ill. 102; *Toledo, W., & W. R. Co. v. Jones*, 76 Ill. 311; *Lake Shore & M. S. R. Co. v. Sunderland*, 2 Brad. (Ill.) 307; *Grows v. Maine Cent. R. Co.*, 67 Me. 100; *Marquette, H., & O. R. Co. v. Handford*, 39 Mich. 537; *Gerety v. Phil., W., & B. R. Co.*, 81 Pa. St. 274; *Moore v. Central R.*, 4 Zab. 268; *Telfer v. Northern R. Co.*, 1 Vroom, 188, 203; *Morris & E. R. Co. v. Haslan*, 4 Vroom, 147; *Langhoff v. Mil. & P. R. Co.*, 23 Wis. 43, 19 Wis. 489; *Haas v. Chicago & N. W. R. Co.*, 41 Wis. 44; *Kearney v. Chicago, M., & St. P. R. Co.*, 47 Wis. 144.

The plaintiff is not required in all cases to prove affirmatively that he looked and listened. It may be inferred, in view of the circumstances, that he did what a prudent man ordinarily would do to save his life, and was governed by the instinct of self-preservation.¹ But if, taking into account the place and other conditions, he must have seen the train if he had looked, it is to be inferred that he did not look.² This inference will not be justified where the circumstances were such that, with the use of his senses, he might not have seen or heard the train.³ Where the proper signals for a train approaching the highway were not given, the traveller's negligence is not to be presumed from the fact that he was on the track when the train crossed the highway.⁴

Ordinarily, a traveller driving in the daytime, who failed to observe a railroad laid across the highway, would be deemed chargeable with negligence; ⁵ but such ignorance does not raise a legal presumption of negligence; and the fact that he was a stranger to the locality is to be considered in determining whether he made a proper use of his faculties to avoid injury.⁶

Duty of the Company.—The company is bound to use every reasonable precaution to prevent injury to travellers on the highway, but not every possible one.⁷ Thus, the placing of a man as a guard on each car of a freight train to give and repeat signals is not ordinarily required.⁸ If the company, by its management of its train, causes unusual peril to travellers, it should meet such peril by corresponding precautions.⁹

¹ *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361; *Penn. R. Co. v. Weber*, 76 Pa. St. 157; *Weiss v. Penn. R. Co.*, 79 Pa. St. 387; *Penn. R. Co. v. Weiss*, 87 Pa. St. 447; *Penn. R. Co. v. Werner*, 89 Pa. St. 59; *Northern Cent. R. Co. v. State*, 29 Md. 420, 438; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Waldele v. New York Cent. & H. R. R. Co.*, 19 Hun, 69; *Solen v. Virginia & T. R. Co.*, 13 Nev. 106, 152; *Donaldson v. Miss. & M. R. Co.*, 18 Iowa, 280; *Richey v. Mo. Pacific R. Co.*, 7 Mo. App. 150. But see *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 248, 252.

² *Brown v. Mil. & St. P. R. Co.*, 22 Minn. 165; *Wilcox v. Rome, W., & O. R. Co.*, 39 N. Y. 358; *Reynolds v. New York Cent. & H. R. R. Co.*, 58 N. Y. 248;

Salter v. Utica & B. R. R. Co., 75 N. Y. 273, 13 Hun, 187; *Mitchell v. New York Cent. & H. R. R. Co.*, 2 Hun, 535.

³ *Ingersoll v. New York Cent. & H. R. R. Co.*, 6 Thomp. & C. 416; *Massoth v. Del. & H. C. Co.*, 64 N. Y. 524.

⁴ *Richey v. Mo. Pacific R. Co.*, 7 Mo. App. 150.

⁵ *Allyn v. Boston & A. R. Co.*, 105 Mass. 77.

⁶ *Cohen v. Eureka & P. R. Co.*, 14 Nev. 376.

⁷ *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 461, 462.

⁸ *Chicago, B., & Q. R. Co. v. Stumps*, 55 Ill. 367.

⁹ *Klein v. Jewett*, 11 C. E. Green, 474, 479, 480, 12 C. E. Green, 550.

The duty of the company to use reasonable precautions to prevent injury extends to travellers on foot as well as to those riding in carriages.¹ But it must be conceded, it has been said, as within the personal experience of every one, that, as a general rule, the exercise of ordinary care will enable a person to cross a railroad track on foot in open daylight with safety, and it requires a strong case to sustain an action under such circumstances.²

Crossing in Front of Street Cars. — It is negligence in a person on foot to attempt to cross the street in front of cars or carriages drawn by horse power on a nice calculation of the chances of a collision; but the question of his negligence becomes one for the jury, where the facts tend to show that in taking the risk he was in the exercise of ordinary care.³ He is not required to anticipate the possibility of an accidental fall while he is crossing.⁴

Obstruction of the Traveller's View. — The company may within its location erect buildings and pile rubbish or materials derived from excavations which obstruct the traveller's view of approaching trains; but it is bound to take the precautions and give the warnings which the peculiar dangers resulting from such obstruction of view reasonably requires.⁵ Such use of the location, however, is not negligence *per se*, or in itself a cause of action.⁶ If the crossing is, from its locality or mode of construction, peculiarly dangerous, corresponding care and precautions are required of the company to prevent injury to persons travelling on the highway.⁷

¹ *Cheney v. New York Cent. & H. R. Co.*, 16 Hun, 415.

² *Cordell v. New York Cent. & H. R. Co.*, 70 N. Y. 119, 125.

³ *Belton v. Baxter*, 58 N. Y. 411, 54 N. Y. 245; *Thurber v. Harlem B., M., & F. R. Co.*, 60 N. Y. 326; *O'Donnell v. New York & H. R. Co.*, 8 Daly, 409.

⁴ *Mentz v. Second Av. R. Co.*, 3 Abbott Ct. App. 274.

⁵ *Cordell v. New York Cent. & H. R. Co.*, 75 N. Y. 330, 70 N. Y. 119, 64 N. Y. 535; *Mackay v. New York Cent. R. Co.*, 85 N. Y. 75; *Richardson v. New York Cent. R. Co.*, 45 N. Y. 846.

⁶ *Cordell v. New York Cent. & H. R. Co.*, 75 N. Y. 330, 70 N. Y. 119, 64 N.

Y. 535; *Central R. Co. v. Feller*, 84 Pa. St. 226. Some courts have held that it is negligence in the company to let weeds and brush grow, or to pile them within the location, so as to obstruct the traveller's view. *Rockford, R. I., & St. L. R. Co. v. Hillmer*, 72 Ill. 235; *Indianapolis & St. L. R. Co. v. Smith*, 78 Ill. 112; *Dimick v. Chicago & N. W. R. Co.*, 80 Ill. 338; *Chicago, B., & Q. R. Co. v. Lee*, 87 Ill. 454.

⁷ *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Penn. R. Co. v. Matthews*, 7 Vroom, 531; *Duffy v. Chicago & N. W. R. Co.*, 32 Wis. 269; *Artz v. Chicago, R. I., & P. R. Co.*, 34 Iowa, 153, 38 Iowa, 293, 44 Iowa, 284.

Injuries by Noises made by the Company, and causing Horses to take Fright.—The authority to operate a railroad includes the right to make the noises incident to the movement and working of its engines, as in the escape of steam and the rattling of cars; and also the right to give the usual and proper admonitions of danger, as in the sounding of whistles and the ringing of bells. It is therefore not liable, while exercising its right in a lawful and reasonable manner, for injuries occasioned by horses, when being driven upon the highway, taking fright at such noises.¹ But if the injury resulting from the fright would not have happened but for a breach of duty by the company, it will be liable for the injury.² Thus, if it neglected to give the signals prescribed by statute, and thereby the traveller was brought into close proximity to the train and his horse became frightened, it is liable for the consequences.³ An action will lie where the horse, though frightened without the company's fault by the smoke and noise of the engine, ran against a defective railing which it was its duty to maintain, and was thereby injured.⁴ It is liable, if the noise was accompanied by an unlawful rate of speed.⁵

The company, in the absence of statute regulations, is limited to the reasonable use of signals, and what is such reasonable use is a question for the jury, subject to the instructions of the court.⁶ It is liable for injuries caused by the whistle, when sounded carelessly or recklessly, or at an improper place, or when not required in the prudent working of its engines and trains.⁷ This has been held where it was sounded under a bridge,⁸ or very

¹ *Burton v. Phil., W., & B. R. Co.*, 4 Harring. (Del.) 252; *Moshier v. Utica & S. R. Co.*, 8 Barb. 427; *Coy v. Utica & S. R. Co.*, 23 Barb. 643; *Flint v. Norwich & W. R. Co.*, 110 Mass. 222; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Favor v. Boston & L. R. Co.*, 114 Mass. 350; *Phil., W., & B. R. Co. v. Stinger*, 78 Pa. St. 219; *Hudson v. L. & N. R. Co.*, 14 Bush, 303; *Whitney v. Maine Cent. R. Co.*, 69 Me. 208.

² *Moshier v. Utica & S. R. Co.*, 8 Barb. 427; *Weiss v. Penn. R. Co.*, 79 Pa. St. 387.

³ *Norton v. Eastern R. Co.*, 113 Mass. 366; *Prescott v. Eastern R. Co.*, 113 Mass. 370, note; *Shaw v. Boston & W. R. Co.*, 8 Gray, 45; *Pollock v. Eastern R. Co.*, 124 Mass. 158; *Penn. R. Co. v. Barnett*, 59 Pa. St. 259; *Phil., W., & B.*

R. Co. v. Stinger, 78 Pa. St. 218; *Hudson v. L. & N. R. Co.*, 14 Bush, 303; *Hart v. Chicago, R. I., & P. R. Co.*, 7 Northwest. Rep. 9.

⁴ *Titcomb v. Fitchburg R. Co.*, 12 Allen, 254.

⁵ *Burton v. Phil., W., & B. R. Co.*, 4 Harring. (Del.) 252.

⁶ *Phil., W., & B. R. Co. v. Stinger*, 78 Pa. St. 219; *Hill v. Portland & R. R. Co.*, 55 Me. 438.

⁷ *Phil., W., & B. R. Co. v. Stinger*, 78 Pa. St. 219; *Toledo, W., & W. R. Co. v. Harmon*, 47 Ill. 298; *Chicago, B., & Q. R. Co. v. Dickson*, 88 Ill. 431; *Phil. & R. R. Co. v. Killips*, 88 Pa. St. 405; *Georgia R. Co. v. Newsome*, 60 Ga. 492.

⁸ *Penn. R. Co. v. Barnett*, 59 Pa. St. 259.

near a highway crossing;¹ and the bell has been thought to be a better signal than the whistle for the starting of a train, particularly where horses are passing on a highway near by.² The company will be liable for injuries resulting from letting off steam in a negligent or unlawful manner.³

The plaintiff's contributory negligence in undertaking to drive, in the neighborhood of the railroad, an untrained or vicious horse or one easily frightened by a locomotive, or in driving his horse unnecessarily into a place of danger, will prevent his recovery, although the horse took fright at noises which the company negligently made.⁴ But the plaintiff's negligence will not be a defence to an action for an injury caused by the wanton blowing of the whistle.⁵ Whether the plaintiff, in leaving the horse unfastened, is chargeable with negligence which will defeat the action, is for the jury.⁶

Duty of the Company to give Signals when not imposed by Statute.—The company, in the absence of a statute provision, should give such signals of warning in approaching highway crossings as are required in the prudent and skilful management of its engines and trains to put individuals using the highways on their guard.⁷ It is a question for the jury, under the instructions of the court, what the signals, when not prescribed by statute, should have been.⁸

Statute provisions requiring signals to be given are cumulative

¹ Manchester, S. J. & A. R. Co. v. Fullarton, 14 C. B. n. s. 53.

² Hill v. Portland & R. R. Co., 55 Me. 438.

³ Borst v. Lake Shore & M. S. R. Co., 4 Hun, 346; Manchester, S. J., & A. R. Co. v. Fullarton, 14 C. B. n. s. 54.

⁴ Phil., W., & B. R. Co. v. Stinger, 78 Pa. St. 219; Murdock v. Warwick, 4 Gray, 178; Bliss v. Wilbraham, 8 Allen, 564; Goldstein v. Chicago, M., & St. P. R. Co., 46 Wis. 404; Chicago & N. W. R. Co. v. Clark, 2 Brad. (Ill.) 116; Whitney v. Maine Cent. R. Co., 69 Me. 208.

⁵ Chicago, B., & Q. R. Co. v. Dickson, 88 Ill. 431.

⁶ Southworth v. Old Colony & N. R. Co., 105 Mass. 342; Wasmer v. D., L., & W. R. Co., 10 N. Y. Week. Dig. 100. See Deville v. Southern Pacific R. Co., 50 Cal. 383.

⁷ Continental Improvement Co. v. Stead, 95 U. S. 161; Reeves v. Del., L.,

& W. R. Co., 30 Pa. St. 454. The company has been held not bound to blow a whistle on approaching a highway, unless required by statute; Brown v. Mil. & St. P. R. Co., 22 Minn. 165. *Contra*, Phil., W., & B. R. Co. v. Stinger, 78 Pa. St. 219; or to give signals on approaching a highway which crosses on a bridge above the railroad. Favor v. Boston & L. R. Co., 114 Mass. 350.

⁸ Cadell v. New York Cent. & H. R. R. Co., 64 N. Y. 535, 6 Hun, 461; Paducah & M. R. Co. v. Hoehl, 12 Bush, 41; Black v. Burlington, C. R., & M. R. Co., 38 Iowa, 515; Galena & C. U. R. Co. v. Dill, 22 Ill. 264, 271; Bauer v. Kansas Pacific R. Co., 69 Mo. 219; Ellis v. Great Western R. Co., L. R. 9 C. P. 551. But see Dyer v. Erie R. Co., 71 N. Y. 228. The company was held indictable for not giving signals in Louisville & N. R. Co. v. Commonwealth, 13 Bush, 388.

only, and the company is still bound to use such other precautions as are required in the prudent and skilful management of its road.¹

The omission of a signal customarily given by the company, though not imposed by statute, is calculated to assure the public that no train is approaching, and is evidence of its negligence; ² but the omission does not relieve the traveller of the duty to use his senses to avoid injury to himself.³

Duty to give Signals when imposed by Statute.—The duty to give certain signals, as to ring a bell or sound a whistle on approaching highway crossings, or to erect sign-boards at such crossings, is generally imposed by statute. It is also imposed by municipal ordinances under legislative authority, which have the force of statutes.⁴ The legislative power to make such regulations will be considered hereafter.⁵ The statute is for the benefit of travellers crossing and approaching the highway, and not for that of persons who are walking upon the track.⁶ It is intended to pre-

¹ *Bradley v. Boston & M. R.*, 2 Cush. 539; *Linfield v. Old Colony R. Co.*, 10 Cush. 562; *Commonwealth v. Boston & W. R. Co.*, 101 Mass. 201; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Favor v. Boston & L. R. Co.*, 114 Mass. 350; *Elkins v. Boston & A. R. Co.*, 115 Mass. 190; *Brown v. New York Cent. R. Co.*, 34 N. Y. 404; *Richardson v. New York Cent. R. Co.*, 45 N. Y. 846; *Eaton v. Erie R. Co.*, 51 N. Y. 544; *Weber v. New York Cent. & H. R. R. Co.*, 67 N. Y. 587, 58 N. Y. 451; *Cordell v. New York Cent. & H. R. R. Co.*, 70 N. Y. 119, 64 N. Y. 535, 79 N. Y. 636, 6 Hun, 461; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Gates v. B., C. R., & M. R. Co.*, 39 Iowa, 45; *Hart v. Chicago, R. I., & P. R. Co.*, 7 Northwest. Rep. 9; *Macon & W. R. Co. v. Davis*, 18 Ga. 679; *South & N. A. R. Co. v. Thompson*, 62 Ala. 494; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313. But see *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9; *Grippen v. New York Cent. R. Co.*, 40 N. Y. 34.

² *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 28; *Kissenger v. New York & H. R. Co.*, 56 N. Y. 538; *McGrath v. New York Cent. & H. R. R. Co.*, 63 N. Y. 522, 59 N. Y. 468, 1 Hun, 437, 3 Thomp. & C. 776; *Waldele v. New York Cent. & H. R. R. Co.*, 19 Hun, 69; *Paducah & M. R. Co. v.*

Hoehl, 12 Bush, 41; *Chaffee v. Boston & L. R. Co.*, 104 Mass. 108; *Goodfellow v. Boston, H., & E. R. Co.*, 106 Mass. 461; *Craig v. New York, N. H., & H. R. Co.*, 118 Mass. 431.

³ *Casey v. New York Cent. & H. R. R. Co.*, 6 Abbott N. C. 104, 78 N. Y. 518; *McGrath v. New York Cent. & H. R. R. Co.*, 58 N. Y. 468, 63 N. Y. 52, 2 Hun, 437, 1 Thomp. & C. 243, 3 Thomp. & C. 776; *Cogswell v. Oregon & C. R. Co.*, 6 Oreg. 417. See *Phil. & T. R. Co. v. Hagan*, 47 Pa. St. 244; *Dublin, W., & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155, Ir. R. 8 C. L. 581, Ir. R. 10 C. L. 256. This rule applies in case of injury to servants, where the statute imposes the same liability for injuries to them as exists in the case of injuries to third parties. *Ditberner v. Chicago, M., & St. P. R. Co.*, 47 Wis. 138.

⁴ *McGrath v. New York Cent. & H. R. R. Co.*, 63 N. Y. 522; *Massoth v. Del. & H. C. Co.*, 64 N. Y. 524; *Baltimore & O. R. Co. v. State*, 29 Md. 252; *St. Louis & S. E. R. Co. v. Mathias*, 50 Ind. 65.

⁵ *Post*, Chap. XVII. p. 462.

⁶ *Harty v. Central R. Co.*, 42 N. Y. 468; *Voak v. Northern Cent. R. Co.*, 75 N. Y. 320; *O'Donnell v. Providence & W. R. Co.*, 6 R. I. 211.

vent injuries from fright as well as from collision.¹ The signals are, it has been held, for a warning to travellers on the highway, and not to passengers leaving or taking trains.²

The company is liable for injuries caused by its omission of these duties, when imposed by statute.³ The omission is calculated to mislead the traveller, and to assure him that the coming of a train is not imminent;⁴ and it is evidence of negligence.⁵

But, though omitting the required signals, the company is not liable for injuries which, while occurring at the time of such omission, are not occasioned thereby.⁶ Thus, if the traveller knew by other means of the coming of a train, the omission could not be deemed the cause of the collision.⁷ Proof of the violation of the statute is not sufficient to determine the company's liability;⁸ and, in order to maintain the action, some proof

¹ Norton v. Eastern R. Co., 113 Mass. 366; Pollock v. Eastern R. Co., 124 Mass. 158; Voak v. Northern Cent. R. Co., 75 N. Y. 320; Hart v. Chicago, R. I., & P. R. Co., 7 Northwest. Rep. 9.

² Terry v. Jewett, 78 N. Y. 338.

³ Beisiegel v. New York Cent. R. Co., 34 N. Y. 622, 14 Abbott Pr. n. s. 29; Ernst v. Hudson River R. Co., 35 N. Y. 9, 32 Barb. 159; Renwick v. New York Cent. R. Co., 36 N. Y. 132; O'Mara v. Hudson River R. Co., 38 N. Y. 445; Gorton v. Erie R. Co., 45 N. Y. 660; Cordell v. New York Cent. & H. R. R. Co., 64 N. Y. 535, 70 N. Y. 119, 6 Hun, 461; Chicago, B., & Q. R. Co. v. Triplett, 38 Ill. 482; Chicago, B., & Q. R. Co. v. Van Patten, 64 Ill. 510, 74 Ill. 91; Dimick v. Chicago & N. W. R. Co., 80 Ill. 338; Peoria, P., & J. R. Co. v. Siltman, 88 Ill. 529; St. Louis & S. E. R. Co. v. Mathias, 50 Ind. 65; Memphis & C. R. Co. v. Copeland, 61 Ala. 376; Hill v. Louisville & N. R. Co., 9 Heisk. 823; Pollock v. Eastern R. Co., 124 Mass. 158. But see Brown v. Buffalo & S. L. R. Co., 22 N. Y. 191.

⁴ Beisiegel v. New York Cent. R. Co., 34 N. Y. 622, 14 Abbott Pr. n. s. 29; Ernst v. Hudson R. R. Co., 35 N. Y. 9, 32 Barb. 159; Commonwealth v. Fitchburg R. Co., 10 Allen, 189; Kennayde v. Pacific R. Co., 45 Mo. 255.

⁵ O'Mara v. Hudson River R. Co., 38

N. Y. 445; Karle v. Kansas City, St. J., & C. B. R. Co., 55 Mo. 476.

⁶ Chicago, B., & Q. R. Co. v. Lee, 68 Ill. 576; Illinois Cent. R. Co. v. Benton, 69 Ill. 174; Toledo, W., & W. R. Co. v. Jones, 76 Ill. 311; Toledo, W., & W. R. Co. v. Durkin, 76 Ill. 395; Chicago, B., & Q. R. Co. v. Harwood, 90 Ill. 425; Briggs v. New York Cent. & H. R. R. Co., 72 N. Y. 26; Karle v. Kansas City, St. J., & C. B. R. Co., 55 Mo. 476; Cleveland, C. C., & I. R. Co. v. Elliott, 28 Ohio St. 340; Cosgrove v. New York Cent. & H. R. R. Co., 13 Hun, 329; Barringer v. New York Cent. & H. R. R. Co., 18 Hun, 398; Dublin, W., & W. R. Co. v. Slattery, L. R. 3 App. Cas. 1155, 1166, Ir. R. 8 C. L. 531, Ir. R. 10 C. L. 256. The same rule applies to the killing of stock. Quincy, A., & St. L. R. Co. v. Wellhoener, 72 Ill. 60.

⁷ Chicago, R. I., & P. R. Co. v. Bell, 70 Ill. 102; Ohio & M. R. Co. v. Eaves, 42 Ill. 288; Lake Shore & M. S. R. Co. v. Clemens, 5 Brad. (Ill.) 77; Houston & T. C. R. Co. v. Nixon, 52 Tex. 19; Pakalinsky v. New York Cent. & H. R. R. Co., 11 N. Y. Week. Dig. 73.

⁸ McGrath v. New York Cent. & H. R. R. Co., 63 N. Y. 522, 59 N. Y. 468, 1 Thomp. & C. 243, 3 Thomp. & C. 776; Stevenson v. Atlantic & P. R. Co., 58 Mo. 503; Holman v. Chicago, R. I., & P. R. Co., 62 Mo. 562; North Eastern R. Co. v. Wanless, L. R. 7 H. L. 12, L. R. 6 Q. B. 481.

must be given tending to show that the injury resulted from the omission.¹ Whether it was the cause of the injury is a question for the jury.²

The imposition by statute of these specific duties does not relieve the traveller of his obligation to use ordinary care to avoid the injury, and, although the company is in default for not performing them, he cannot recover against it if, by want of such care, he contributed to the injury.³ He is still required to use his senses vigilantly, and to listen and look both ways, on approaching the track, in order to discover if a train is about to pass.⁴

Duty to place Flagmen at Crossings.—The company is not, unless required by statute, bound to place flagmen at highway crossings, except under special circumstances which render the precaution necessary for public safety.⁵ The duty does not arise merely

¹ *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548; *Chicago, R. I., & P. R. Co. v. McKean*, 40 Ill. 218; *Steves v. Oswego & S. R. Co.*, 18 N. Y. 422; *Briggs v. New York Cent. & H. R. R. Co.*, 72 N. Y. 26. Non-compliance with the statute, when shown to be reasonable and prudent under the circumstances, has been excused. *Wakefield v. Conn. & P. R. R. Co.*, 37 Vt. 330. See *Cleveland, C. C., & I. R. Co. v. Elliott*, 28 Ohio St. 340, 350.

² *Illinois Cent. R. Co. v. Benton*, 69 Ill. 174; *Dublin, W., & W. R. Co. v. Slatery*, L. R. 4 App. Cas. 1155, Ir. R. 8 C. L. 531, Ir. R. 10 C. L. 256.

³ *Steves v. Oswego & S. R. Co.*, 18 N. Y. 422; *Wilcox v. Rome, W., & O. R. Co.*, 39 N. Y. 358; *Havens v. Erie R. Co.*, 41 N. Y. 296; *Eaton v. Erie R. Co.*, 51 N. Y. 544; *Haring v. New York & E. R. Co.*, 13 Barb. 9; *Sheffield v. Rochester & S. R. Co.*, 21 Barb. 339; *Toledo, W., & W. R. Co. v. Jones*, 76 Ill. 311; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Cleveland, C. C., & I. R. Co. v. Elliott*, 28 Ohio St. 340; *Artz v. Chicago, R. I., & P. R. Co.*, 34 Iowa, 153, 38 Iowa, 293, 44 Iowa, 284; *Dodge v. Burlington, C. R., & M. R. Co.*, 34 Iowa, 276; *Payne v. Chicago, R. I., & P. R. Co.*, 39 Iowa, 523, 44 Iowa, 236; *Lang v. Holiday Creek R. & C. M. Co.*, 49 Iowa, 469; *Harlan v. St. Louis, K. C., & N. R. Co.*, 64 Mo. 480; *Zimmerman v. Hannibal & St. J. R. Co.*, 11 C. L. J. 96; *Parke v. Adams*, 12 Met. 415; *Commonwealth v. Fitchburg R. Co.*, 10 Allen, 189.

⁴ *Gorton v. Erie R. Co.*, 45 N. Y. 660; *Lang v. Holiday Creek R. & C. M. Co.*, 49 Iowa, 469; *Fletcher v. Atlantic & P. R. Co.*, 64 Mo. 484; *Leduke v. St. Louis & I. M. R. Co.*, 4 Mo. App. 485; *Langan v. St. Louis, I. M., & S. R. Co.*, 5 Mo. App. 311; *Chicago, R. I., & P. R. Co. v. Houston*, 95 U. S. 697; *Chicago, B., & Q. R. Co. v. Lee*, 68 Ill. 577; *Chicago, B., & Q. R. Co. v. Harwood*, 80 Ill. 88; *Lake Shore & M. S. R. Co. v. Sunderland*, 2 Brad. (Ill.) 307.

⁵ *State v. Phil., W., & B. R. Co.*, 47 Md. 76; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 39 N. Y. 61, 24 How. Pr. 97; *Grippen v. New York Cent. & H. R. R. Co.*, 40 N. Y. 34; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451, 459; *Culhane v. New York Cent. & H. R. R. Co.*, 60 N. Y. 133, 67 Barb. 562; *McGrath v. New York Cent. & H. R. R. Co.*, 63 N. Y. 522, 59 N. Y. 468; *Pakalinsky v. New York Cent. & H. R. R. Co.*, 11 N. Y. Week. Dig. 73; *Sutherland v. New York Cent. & H. R. R. Co.*, 41 N. Y. Superior, 17; *Commonwealth v. Boston & W. R. Co.*, 101 Mass. 201; *Shaw v. Boston & W. R. Co.*, 8 Gray, 45; *Phil. & R. R. Co. v. Killips*, 88 Pa. St. 405; *Delaware, L., & W. R. Co. v. Toffey*, 9 Vroom, 525; *Stapley v. London, B., & S. C. R. Co.*, L. R. 1 Ex. 21, 4 Hurl. & C. 93; *Stubley v. London & N. W. R. Co.*, L. R. 1 Exch. 13; *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258; *Bilbee v. London, B., & S. C. R. Co.*, 18 C. B. n. s. 584. The custom

from the number of persons who use the crossing, but it may be created by an exceptionally dangerous mode of crossing adopted by the company for its own convenience.¹ When the duty is imposed, the company is liable for injuries resulting from its non-performance.²

Whether the duty to place a flagman at a crossing exists except under a statute, may well be doubted; certainly it is not one which should be left to be determined by the caprice of juries.³ This remark applies also to the maintenance of gates and other signals, the requirement of which is peculiarly a matter of legislative discretion, and likely to be constantly varied with new discoveries and experiments. The track itself is always a warning of danger;⁴ and it is a common experience that some precautions, on which too great reliance is likely to be placed, induce inattention in travellers, and increase the chances of injury which they were intended to diminish.⁵

Some authorities, while withdrawing the question from the jury, whether a flagman should be placed at a crossing, allow the omission to place one to be considered as a part of the *res gestæ*, and bearing on the question of the company's care or negligence in the management of its trains,⁶—a distinction not very intelligible to the profession, and certainly not capable of practical application by plain men. A distinction has also been made between signals from the engine or train, and signals upon or near the track,—the former being for the jury to pass upon, but the latter not.⁷

of railroad companies is not admissible in determining the question. *Bailey v. New Haven & N. R. Co.*, 107 Mass. 496.

¹ *Penn. R. Co. v. Matthews*, 7 Vroom, 531; *Phil. & R. R. Co. v. Killips*, 88 Pa. St. 405; *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258, 263, 265.

² *Pollock v. Eastern R. Co.*, 124 Mass. 158. The English Railway Clauses Consolidation Act, 1845, § 47, requires the company to maintain gates across highways, and to employ proper persons to open and shut them when cattle or carriages are passing. *Stapley v. London, B., & S. C. R. Co.*, L. R. 1 Exch. 21; *Lunt v. London & N. W. R. Co.*, L. R. 1 Q. B. 277; *Wanless v. North Eastern R. Co.*, L. R. 6 Q. B. 481, L. R. 7 H. L. 12.

³ *Beisiegel v. New York Cent. R. Co.*, 40 N. Y. 9; *Weber v. New York Cent. &*

H. R. R. Co., 58 N. Y. 451; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *State v. Phil. W., & B. R. Co.*, 47 Md. 76; *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258. It was held to be a question for the jury in *Eaton v. Fitchburg R. Co.*, 129 Mass.

⁴ *McGrath v. New York Cent. & H. R. R. Co.*, 59 N. Y. 468, 473; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 290; *Stubbley v. London & N. W. R. Co.*, L. R. 1 Exch. 13, 16, 4 Hurl. & C. 93.

⁵ *Stubbley v. London & N. W. R. Co.*, L. R. 1 Exch. 13, 18, Bramwell, B.

⁶ *Ernst v. Hudson River R. Co.*, 39 N. Y. 61; *McGrath v. New York Cent. & H. R. R. Co.*, 63 N. Y. 522, 59 N. Y. 468; *Casey v. New York Cent. & H. R. R. Co.*, 78 N. Y. 518, 6 Abbott N. C. 104.

⁷ *Dyer v. Erie R. Co.*, 71 N. Y. 228, 233.

The absence of a flagman voluntarily placed by the company at a crossing, or his neglect of his usual functions, may charge the company with negligence;¹ but his absence will not relieve the traveller of the duty to use his senses.² The company, is liable where by his directions he leads the traveller into danger.³ Whether the flagman did his duty or not will depend upon the circumstances of each case.⁴

Rate of Speed.—The company, in approaching and crossing highways, is not, in the absence of statute prohibitions, limited to any particular rate of speed which is consistent with the safety of the passengers. The rule, as sometimes stated, is that no conceivable rate is *per se* negligence.⁵ Unusual speed, though not *per se* negligence, may be considered with other facts as bearing on the degree of care used.⁶ Some authorities allow the jury to determine whether the company was exceeding a reasonable and proper rate of speed;⁷ but this is doubtful where the statute has not imposed a limit.

The company is liable for injuries caused by its running its train at a rate prohibited by statute,⁸ but it is not, while so run-

¹ Ernst v. Hudson River R. Co., 39 N. Y. 61, 35 N. Y. 9; Warner v. New York Cent. R. Co., 44 N. Y. 465, 45 Barb. 299; Kissenger v. New York & H. R. Co., 56 N. Y. 538; McGovern v. New York Cent. & H. R. R. Co., 67 N. Y. 417, 423; Dolan v. Del. & H. C. Co., 71 N. Y. 285; Casey v. New York Cent. & H. R. R. Co., 78 N. Y. 518, 8 Daly, 220, 6 Abbott N. C. 104; Beisiegel v. New York Cent. R. Co., 34 N. Y. 622, 632; St. Louis, V., & T. H. R. Co. v. Dunn, 78 Ill. 197; Phil. & R. R. Co. v. Killips, 88 Pa. St. 405.

² Lake Shore & M. S. R. Co. v. Sunderland, 2 Brad. (Ill.) 307.

³ Borst v. Lake Shore & M. S. R. Co., 4 Hun, 346; Warren v. Fitchburg R. Co., 8 Allen, 227; Wheelock v. Boston & A. R. Co., 105 Mass. 203, 207.

⁴ Delaware, L., & W. R. Co. v. Toffey, 9 Vroom, 525. See Lunt v. London & N. W. R. Co., L. R. 1 Q. B. 277; Wanless v. North Eastern R. Co., L. R. 6 Q. B. 481, L. R. 7 H. L. 12.

⁵ Warner v. New York Cent. R. Co., 44 N. Y. 465; Chicago, B., & Q. R. Co. v. Lee, 68 Ill. 576; Chicago, B., & Q. R. Co. v. Harwood, 80 Ill. 88; Maher v. Atlantic

& P. R. Co., 64 Mo. 267; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537, 546; McKonkey v. Chicago, B., & Q. R. Co., 40 Iowa, 205; Commonwealth v. Fitchburg R. Co., 126 Mass. 472, 120 Mass. 372; Grows v. Maine Cent. R. Co., 67 Me. 100, 105; Telfer v. Northern R. Co., 1 Vroom, 188, 192; Zeigler v. North Eastern R. Co., 5 S. C. 221, 7 S. C. 402; Bemis v. Conn. & P. R. Co., 42 Vt. 375; Cohen v. Eureka & P. R. Co., 14 Nev. 376. But see Reeves v. Del., L., & W. R. Co., 30 Pa. St. 454.

⁶ Burton v. Phil., W., & B. R. Co., 4 Harring. 252; Artz v. Chicago, R. I., & P. R. Co., 44 Iowa, 284, 34 Iowa, 154, 38 Iowa, 293; Indianapolis & St. L. R. Co. v. Stables, 62 Ill. 313; Pryor v. St. Louis, K. C., & N. R. Co., 69 Mo. 215.

⁷ Wilds v. Hudson River R. Co., 29 N. Y. 315; Massoth v. Del. & H. C. Co., 64 N. Y. 524; Continental Improvement Co. v. Stead, 95 U. S. 161; Wabash R. Co. v. Henks, 91 Ill. 406; Penn. R. Co. v. Lewis, 79 Pa. St. 33; Toledo, P., & W. R. Co. v. Foster, 43 Ill. 415; Rockford, R. I., & St. L. R. Co. v. Hillmer, 72 Ill. 235; South & N. A. R. Co. v. Thompson, 62 Ala. 494.

⁸ Jetter v. New York & H. R. Co., 2

ning, liable for injuries which the traveller could have avoided by the exercise of ordinary care.¹ A traveller, it has been held, may, when about to cross with a train in sight, assume that it is running at a lawful speed.²

It has been held that the company must run its trains with more care in villages and cities,⁴ particularly with reference to children, than in the open country, and even run at a less speed; and that whether the speed was reasonable and lawful is a question of fact for the jury.⁵ Certain signals may well be required in some places which are not in others; but the requirement of less speed in running through centres of population would interfere greatly with express trains, and should be left to legislative discretion.

Duty of the Company to avail itself of well-tested Improvements. —

The duty of the company to avail itself of well-tested inventions and improvements, which materially contribute to safety, has

Abbott Ct. App. 458, 2 Keyes, 154; Massoth v. Del. & H. C. Co., 64 N. Y. 524, 6 Hun, 314; Wasmer v. D., L., & W. R. Co., 10 N. Y. Week. Dig. 100; Haas v. Chicago & N. W. R. Co., 41 Wis. 44; Correll v. B., C. R., & M. R. Co., 38 Iowa, 120; Madison & I. R. Co. v. Taffe, 37 Ind. 361; St. Louis & S. E. R. Co. v. Mathias, 50 Ind. 65; Toledo, W., & W. R. Co. v. O'Connor, 77 Ill. 391; St. Louis, V., & T. H. R. Co. v. Dunn, 78 Ill. 197; Chicago & A. R. Co. v. Becker, 84 Ill. 483; Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 534; Liddy v. St. Louis R. Co., 40 Mo. 506. The excess of speed beyond legal rate was held not to be evidence of negligence in Brown v. Buffalo & S. L. R. Co., 22 N. Y. 191. A statute provision against the running of trains beyond a certain rate of speed does not authorize a running at such a rate under all circumstances. Wabash R. Co. v. Henks, 91 Ill. 406. See, as to the construction of Illinois statute, Pittsburg, C., & St. L. R. Co. v. Knutson, 69 Ill. 103; Lake Shore & M. S. R. Co. v. Berlink, 2 Brad. (Ill.) 427.

¹ Illinois Cent. R. Co. v. Hetherington, 83 Ill. 510.

² Langhoff v. Mil., & P. R. Co., 19 Wis. 489; Correll v. B., C. R., & M. R.

Co., 38 Iowa, 120; Schmidt v. Chicago & N. W. R. Co., 83 Ill. 405.

³ Fero v. Buffalo & S. L. R. Co., 22 N. Y. 209; Beisiegel v. New York Cent. R. Co., 34 N. Y. 622, 628; Costello v. Syracuse, B., & N. Y. R. Co., 65 Barb. 92; Paducah & M. R. Co. v. Hoehl, 12 Bush, 41; Norfolk & P. R. Co. v. Ormsby, 27 Gratt. 455; Isabel v. Hannibal & St. J. R. Co., 60 Mo. 475; Hicks v. Pacific R. Co., 64 Mo. 430; Frick v. St. Louis, K. C., & N. R. Co., 5 Mo. App. 435, 443.

⁴ Chicago & A. R. Co. v. Gregory, 58 Ill. 226; Indianapolis & St. L. R. Co. v. Galbreath, 63 Ill. 436; Pittsburg, C., & St. L. R. Co. v. Knutson, 69 Ill. 103; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Toledo, W., & W. R. Co. v. Miller, 76 Ill. 278; Chicago & A. R. Co. v. Engle, 84 Ill. 397; Chicago & A. R. Co. v. Becker, 84 Ill. 483, 76 Ill. 25; Lafayette & I. R. Co. v. Adams, 26 Ind. 76; Meyer v. Midland Pacific R. Co., 2 Neb. 319; Brown v. New York Cent. R. Co., 34 N. Y. 404; Cordell v. New York Cent. & H. R. R. Co., 70 N. Y. 119; Daley v. Norwich & W. R. Co., 26 Conn. 591; Reeves v. Del., L., & W. R. Co., 30 Pa. St. 454; Phil. & R. R. Co. v. Long, 75 Pa. St. 257; Penn. R. Co. v. Lewis, 79 Pa. St. 33; Pacific R. Co. v. Houts, 12 Kan. 328; Kansas Pacific R. Co. v. Ward, 4 Col. 30.

been much considered with reference to its passengers ;¹ but it is a duty which extends also to other persons rightfully using or crossing its track.² Thus, it should use the brakes which are found to be the most efficient for stopping trains.³

Whether a headlight or light at other parts of the train should be used is a question of reasonable care, to be determined by the facts of the case.⁴ The company is not under an obligation to trespassers to use the appliances most efficient for safety.⁵ Negligence cannot be imputed to the company, from the fact that a train is behind time.⁶

Acts and Omissions of the Company which are deemed Negligence.

— Certain definite acts are deemed negligence in a company in crossing highways, to wit: making of a “running” or “flying” switch, unless special precautions are used for notifying travellers;⁷ starting or moving back a train,⁸ or pushing it back by a locomotive in a reversed position,⁹ without further notice than if the movement were forward; the running of a train without a sufficient number of brakemen,¹⁰ or without an experienced engineer in a much frequented place;¹¹ sending a car around a curve or down grade without a brakeman, at a place where the company allowed the public to pass;¹² and sending a car at night across a frequented street without a brakeman or a light.¹³

¹ *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

² *Smith v. New York & H. R. Co.*, 19 N. Y. 127; *Gagg v. Vetter*, 41 Ind. 228.

³ *Costello v. Syracuse, B., & N. Y. R. Co.*, 65 Barb. 92.

⁴ *Cheney v. New York Cent. & H. R. Co.*, 16 Hun, 415; *L. & N. R. Co. v. Melton*, 2 Lea (Tenn.), 262.

⁵ *McKenna v. New York Cent. & H. R. Co.*, 8 Daly, 304.

⁶ *State v. Phil., W., & B. R. Co.*, 47 Md. 76.

⁷ *Brown v. New York Cent. R. Co.*, 32 N. Y. 597; *Butler v. Mil. & St. P. R. Co.*, 28 Wis. 487; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461; *French v. Taunton Branch R. Co.*, 116 Mass. 537. See *Jeffrey v. K. & D. M. R. Co.*, 51 Iowa, 489.

⁸ *Eaton v. Erie R. Co.*, 51 N. Y. 544;

Maginnis v. New York Cent. & H. R. R. Co., 52 N. Y. 218; *Weber v. New York Cent. & H. R. R. Co.*, 58 N. Y. 451, 457; *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417; *Cordell v. New York Cent. & H. R. R. Co.*, 70 N. Y. 119, 64 N. Y. 535; *Kansas Pacific R. Co. v. Pointer*, 14 Kan. 37; *Robinson v. Western Pacific R. Co.*, 48 Cal. 409, 422; *McWilliams v. Detroit Cent. M. Co.*, 31 Mich. 274. See *Sutton v. New York Cent. & H. R. R. Co.*, 66 N. Y. 243, 4 Hun, 760.

⁹ *Chicago, B., & Q. R. Co. v. Triplett*, 38 Ill. 482.

¹⁰ *Toledo, W., & W. R. Co. v. McGinnis*, 71 Ill. 346; *Kansas Pacific R. Co. v. Pointer*, 14 Kan. 37, 9 Kan. 620.

¹¹ *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445.

¹² *Kay v. Penn. R. Co.*, 65 Pa. St. 269.

¹³ *Chicago & A. R. Co. v. Garvey*, 58 Ill. 83.

Injuries from Defective Crossings. — The liability of the company for injuries to travellers on the highway, caused by its negligence in the construction and maintenance of proper crossings, has been considered in an earlier chapter.¹

¹ *Ante*, Chap. VIII. p. 248.

CHAPTER XIII.

INJURIES TO SERVANTS.

General Doctrine of a Master's Non-liability to a Servant for the Acts of Fellow-servants. — The liability of a common carrier to passengers depends on his peculiar contract for safe transportation. The liability of persons lawfully using highways, or exercising other independent rights, is determined by the pervading principle of social duty as well as of the common law, that each must exercise his right with due regard to the equal right of others; and such liability extends to the acts of servants when performed in the course of their employment. The liability of a master to his servant differs not only from that of the common carrier, but also from that of persons who bear no relation of privity to each other. It is determined by a contract which the law, guided by considerations of public policy, implies from the relation of the parties. The master is under an obligation to each servant to use reasonable care in associating with him servants who are, in fidelity and intelligence, competent for their duties; but an agreement to be responsible to each servant for the particular acts of negligence or breaches of duty of other servants, whom he has used due care in selecting, cannot reasonably be implied from the contract of hiring. The servant, by entering on and continuing in the employment, is presumed to take upon himself its natural and ordinary risks and perils, among which are the negligent acts of fellow-servants, in whose selection the master has used reasonable care, and in legal presumption his compensation is adjusted accordingly. To extend the master's liability further, and hold him liable to his servants in like manner as to third persons for the negligent acts of fellow-servants, would, it has been deemed by the best judicial opinion, encourage persons engaged in a common service to be less observant of each other's fidelity, and less disposed to report to the employer instances of their incompetency and untrustworthiness.

The doctrine here stated was, in England, first declared in 1837, by Lord Abinger, in a case since much cited.¹ It was held in South Carolina in 1841, in a decision² which made no reference to the English authority, and was affirmed in Massachusetts in 1842, in an elaborate opinion of Chief Justice Shaw, which has become the leading American case.³ It is now established law in this country,⁴ as well as in England⁵ and Scotland.⁶

Where, therefore, persons are employed by a railroad company to perform the same or separate duties, all tending to the accomplishment of one and the same general purpose or end, — that of the maintenance and management of the railroad, — one person so employed cannot maintain an action against the company for any injury received by him through the careless, negligent, or unskilful act of another engaged in the same service.⁷

¹ *Priestly v. Fowler*, 3 M. & W. 1.

² *Murray v. So. Car. R. Co.*, 1 McMullen, 385.

³ *Farwell v. Boston & W. R. Co.*, 4 Met. 49. This able opinion has been several times recognized in Great Britain: *Waller v. South Eastern R. Co.*, 2 Hurl. & C. 102, 111, 112; and it is reprinted in 3 Macq. 316-322.

⁴ *Brown v. Maxwell*, 6 Hill, 592; *Walker v. Bolling*, 22 Ala. 294; *Cook v. Parham*, 24 Ala. 21; *Camp v. Church Wardens*, 7 La. An. 321; *Fox v. Sandford*, 4 Sneed, 36; *McMahon v. Davidson*, 12 Minn. 357; *Carle v. Bangor & P. C. & R. Co.*, 43 Me. 269; *Price v. Houston Direct Nav. Co.*, 46 Tex. 535; *Wood v. New Bedford Coal Co.*, 121 Mass. 252; *Kelley v. Boston Lead Co.*, 128 Mass. 456; *Halverson v. Nisen*, 3 Sawyer, 562; 2 Southern Law Rev. n. s. 108.

⁵ *Wigmore v. Jay*, 5 Exch. 454; *Lovegrove v. London, B., & S. C. R. Co.*, 16 C. B. n. s. 669; *Lovell v. Howell*, L. R. 1 C. P. Div. 161; *Rourke v. White Moss Colliery Co.*, L. R. 1 C. P. Div. 556.

⁶ *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Bartonshill Coal Co. v. McGuire*, 3 Macq. 300; *Wilson v. Merry*, L. R. 1 H. L. (Scotch) 326. The rule was at first rejected in Scotland. *Dixon v. Ranken*, 14 Cases Ct. Session, 2d (1852), 420.

⁷ *Farwell v. Boston & W. R. Co.*, 4 Met. 49; *Gilman v. Eastern R. Co.*, 10 Allen, 233, 13 Allen, 433; *Honner v. Ill.*

Cent. R. Co., 15 Ill. 550; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20; *Toledo, W., & W. R. Co. v. Durkin*, 76 Ill. 395; *Chicago & N. W. R. Co. v. Scheuring*, 4 Brad. (Ill.) 583; *Harrison v. Central R. Co.*, 2 Vroom, 293; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153, 15 Barb. 574; *Warner v. Erie R. Co.*, 39 N. Y. 468, 470; *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Madison & I. R. Co. v. Bacon*, 6 Ind. 205; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174, 182; *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 371; *Sullivan v. Toledo, W., & W. R. Co.*, 58 Ind. 26; *Sullivan v. Miss. & M. R. Co.*, 11 Iowa, 421; *Hunt v. Chicago & N. W. R. Co.*, 26 Iowa, 363; *Dow v. Kansas Pacific R. Co.*, 8 Kan. 642; *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475; *Colorado Cent. R. Co. v. Ogden*, 3 Col. 499; *Hogan v. Cent. Pacific R. Co.*, 49 Cal. 128; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Robinson v. Houston & T. C. R. Co.*, 46 Tex. 540; *New Orleans, J., & G. N. R. Co. v. Hughes*, 49 Miss. 258; *Flinn v. Phil., W., & B. R. Co.*, 1 Houst. (Del.) 469; *Ponton v. Wil. & W. R. Co.*, 6 Jones (N. C.), 245; *Hubgh v. New Orleans & C. R. Co.*, 6 La. An. 495; *Mitchell v. Penn. R. Co. (Com. Pleas, Penn.)*, 1 Am. Law Reg. 717; *Hutchinson v. York, N., & B. R. Co.*, 5 Exch. 343; *Skipv. v. Eastern Counties R. Co.*, 9 Exch. 223; *Lovegrove v. London, B., & S. C. R. Co.*, 16 C. B. n. s. 669.

The policy and justice of the rule have been sometimes questioned,¹ and the rule itself has been rejected in two States.² It has been changed or modified by statute in Iowa³ and Georgia,⁴ though in the former State only as relating to employees engaged in operating the road. In Wisconsin, it is, by statute, not to be applied to the employees of railroad companies.⁵ Elsewhere in the United States it has been generally adopted, though in some jurisdictions, while nominally accepted, it is so qualified by exceptions and refinements that little remains of it. It is better to reject it altogether than to fritter it away by minute and unintelligible distinctions.⁶ In Pennsylvania the rule has been extended by statute to other persons not servants of the company, who are employed or engaged on or about its road or works.⁷

Rule applied to Minors. — The rule applies to minors and persons of immature judgment who are injured by the negligence of fellow-servants.⁸ But the immaturity and inexperience are to be considered upon a question of the contributory negligence or sufficiency of knowledge as to the danger to which they are exposed.⁹

¹ *Little Miami R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland, C., & C. R. Co. v. Keary*, 3 Ohio St. 201; *Burke v. Norwich & W. R. Co.*, 34 Conn. 474. For Baron Bramwell's defence of the rule, see 11 Cent. L. J. 123. The text of the English "Employers' Liability Bill," defining and modifying the rule, is given in 22 Albany L. J. 276.

² *Louisville & N. R. Co. v. Collins*, 2 Duvall, 114; *Louisville & N. R. Co. v. Robinson*, 4 Bush, 507; *Louisville & N. R. Co. v. Filbern*, 6 Bush, 574; *Louisville, C., & L. R. Co. v. Mahony*, 7 Bush, 235; *Haynes v. East Tenn. & G. R. Co.*, 3 Cold. 222. It was at first rejected in Wisconsin: *Chamberlain v. Mil. & M. R. Co.*, 11 Wis. 238, 7 Wis. 425; but was afterwards approved in that State: *Moseley v. Chamberlain*, 18 Wis. 700; *Cooper v. Mil. & P. R. Co.*, 23 Wis. 668.

³ *Deppe v. Chicago, R. I., & P. R. Co.*, 38 Iowa, 592, 36 Iowa, 52; *Schroeder v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 344, 47 Iowa, 375; *McKnight v. Iowa & M. R. Const. Co.*, 43 Iowa, 406; *Potter v. Chicago, R. I., & P. R. Co.*, 46 Iowa, 399; *Pyne v. Chicago, & C. R. Co.*, 11 Cent. L. J.

55. The statute is local, and will not be applied where the action is brought in another State. *Anderson v. Mil. & St. P. R. Co.*, 37 Wis. 321.

⁴ *Thompson v. Central R. & B. Co.*, 54 Ga. 509; *Western & A. R. Co. v. Adams*, 55 Ga. 279; *Marsh v. South Carolina R. Co.*, 56 Ga. 274; *Georgia, R., & B. Co. v. Rhodes*, 56 Ga. 645.

⁵ *Berg v. Chicago, M., & St. P. R. Co.*, 7 Northwest. Rep. 347.

⁶ *Vose v. Lancashire & Y. R. Co.*, 2 Hurl. & N. 728; *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510.

⁷ *Ricard v. North Penn. R. Co.*, 89 Pa. St. 193.

⁸ *King v. Boston & W. R. Co.*, 9 Cush. 112; *Brown v. Maxwell*, 6 Hill, 592; *De Graff v. New York Cent. & H. R. R. Co.*, 76 N. Y. 125, 3 Thomp. & C. 255; *Ohio & M. R. Co. v. Hammersley*, 28 Ind. 371; *Sullivan v. Toledo, W., & W. R. Co.*, 58 Ind. 26; *Gartland v. Toledo, W., & W. R. Co.*, 67 Ill. 498; *Houston & G. N. R. Co. v. Miller*, 51 Tex. 270; *Murphy v. Smith*, 19 C. B. n. s. 361.

⁹ *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Sullivan v. India Man.*

It has been held not to apply to slaves, who have no freedom of volition.¹ It is applied to the construction of statutes giving a right of action to the personal representatives or relatives of a deceased person against parties by whose negligence his death was caused, which are held not to give such right against a master in case of the death of one servant caused by the negligence of his fellow-servants.²

Common Service.—The terms “common service or employment” are to be understood in a broad, rather than a limited signification. Employees are associated in such a service when they are engaged in accomplishing the ultimate purpose in view, as the working of the railroad,³ and the safe and rapid transmission of the trains.⁴ The “common,” and not the “common immediate,” object is to be regarded.⁵ The employees are within the relation where one may, in entering the employment, foresee that injuries from the negligence of the other is one of its natural or ordinary risks,⁶ or where the duties of one necessarily or naturally expose him to hazard from the negligence of the other.⁷ It has been said that all being regarded as fellow-servants who are engaged in the common service of operating the road, “in this sense those employed in facilitating the running of the trains by ballasting the track, removing obstructions, or keeping guard to prevent obstructions, and those employed at stations, attending to switches, and other duties of a like nature upon the road, as well as those upon the trains, operating, may all be well regarded as fellow-servants in the common service.”⁸ The attempt to

Co., 113 Mass. 396; *O'Connor v. Adams*, 120 Mass. 427; *Hill v. Gust*, 55 Ind. 45; *Union Pacific R. Co. v. Fort*, 17 Wall. 553; *Johnson v. Bruner*, 61 Pa. St. 58; *Grizzle v. Frost*, 3 Fost. & F. 622.

¹ *Scudder v. Woodbridge*, 1 Ga. 195; *Louisville & N. R. Co. v. Yandell*, 17 B. Monr. 586. See *Cook v. Parham*, 24 Ala. 21.

² *Hutchinson v. York, N., & B. R. Co.*, 5 Exch. 343; *Wigmore v. Jay*, 5 Exch. 354; *Connor v. Chicago, R. I., & P. R. Co.*, 59 Mo. 285.

³ *Hard v. Vt. & C. R. Co.*, 32 Vt. 473; *Wonder v. Balt. & O. R. Co.*, 32 Md. 411, 418; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 565; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174.

⁴ *Farwell v. Boston & W. R. Co.*, 4

Met. 49, 55; *Waller v. South Eastern R. Co.*, 2 Hurl. & C. 102.

⁵ *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149, 155; *Lovell v. Howell*, L. R. 1 C. P. Div. 161, 168; *Charles v. Taylor*, L. R. 3 C. P. Div. 492; *Blake v. Maine Cent. R. Co.*, 70 Me. 60.

⁶ *McAndrews v. Burns*, 10 Vroom, 117, 119, 120; *Mullan v. Phil. & S. M. Steamship Co.*, 78 Pa. St. 25.

⁷ *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336, 339; *Valtez v. Ohio & M. R. Co.*, 85 Ill. 500, 502; *Cumberland & P. R. Co. v. State*, 44 Md. 283, 292. But see *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302.

⁸ *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174, 183.

split the common service into parts, calling each a particular line of employment, so that service in one is held not to be common with service in another, has been well characterized as "over-refining."¹

The servants, in order to be in a common service, need not be performing the same or similar acts, or be engaged in the same operation or particular work, but may be employed in dissimilar duties or separate departments of a general business, and brought rarely in proximity to each other. It is sufficient if they are employed by the same master, and are engaged in the same general purpose or undertaking,—the maintenance and working of the railroad.² The servant who received the injury and the servant who caused it may be fellow-servants, though employed on different trains.³

The fact, however, that two persons are in the employ of the same master or company does not necessarily make them co-servants, and their service a common one. If they are exercising an independent employment, as in the case of legal advisers, financial agents, civil engineers, or contractors, they are not its servants. So, also, although employed wholly under the direction of the company's officers, their service may be of such a purely business or clerical nature, as in the case of book-keepers and ticket agents, that they cannot be regarded as co-servants of employees whose service relates to the working of the trains, or to the construction and repair of the road and machinery. The service of such employees is so distinct and remote from that of operating the trains, that they are not presumed to have assumed the risks arising from the negligence of those in charge of them. Their means of informing themselves of the character of such servants

¹ *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149, 155, 5 B. & S. 570; *Lovell v. Howell*, L. R. 1 C. P. Div. 161, 168. In *Vose v. Lancashire & Y. R. Co.*, 2 Hurl. & N. 728, 734. *Pollock, C. B.*, said, "We ought not to allow so important a case (*Priestley v. Fowler*, 3 M. & W. 1) to be frittered away by minute distinctions, or the ingenuity of advocates."

² *Farwell v. Boston & W. R. Co.*, 4 Met. 49, 60; *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153, 15 Barb. 574; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 28 Barb. 80; *Slattery v. Toledo & W. R. Co.*, 23 Ind. 81; *Columbus & I. C. R. Co.*

v. Arnold, 31 Ind. 174, 183; *Valtez v. Ohio & M. R. Co.*, 85 Ill. 500; *New Orleans, J., & G. N. R. Co. v. Hughes*, 49 Miss. 258; *Foster v. Minn. Cent. R. Co.*, 14 Minn. 360; *McAndrews v. Burns*, 10 Vroom, 117; *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149, 5 B. & S. 570; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266, 295; *Swainson v. North Eastern R. Co.*, L. R. 3 Exch. Div. 341, 344.

³ *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417; *Pittsburg, Ft. W., & C. R. Co. v. Devinney*, 17 Ohio St. 197; *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510; *Hayes v. Western R. Co.*, 3 Cush. 270.

are little better than those of the public, while their control or influence over them is no greater.¹

Some authorities do not regard employees in a common service unless they are performing similar duties, or employed in the same department of service, or are brought into an immediate connection or relation with each other. With this view laborers on the track have been held not to be in a common service with servants who are managing engines and cars upon it.² The rule, as qualified and restricted, has been stated to be that the master's liability to one servant for another's negligence exists, unless they were so co-operating at the time of the injury in the business in hand, or their usual duties so brought them into relations of personal association, that they had the power of influencing each other to the exercise of constant caution by counsel, exhortation, and example, or by reporting delinquencies to the master. In applying this rule, the company was held liable to a track-repairer who was injured by a fireman's careless throwing of a lump of coal from a train.³

The following are illustrations of common service within the rule which exempts the company from liability to one employee for injuries caused by the negligence of another:⁴ engineer and switch-tender;⁵ brakeman and conductor;⁶ brakeman and switch-

¹ *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417, 424; *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108, 110; *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336, 338. A porter at a station has been held not to be in a common service with an engine-driver by whose negligence he was injured. *Warburton v. Great Western R. Co.*, L. R. 2 Exch. 20. See *Rourke v. White Moss Colliery Co.*, L. R. 1 C. P. Div. 556, 561.

² *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171; *Pittsburg, Ft. W., & C. R. Co. v. Powers*, 74 Ill. 341; *Toledo, W., & W. R. Co. v. O'Connor*, 77 Ill. 391; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 347; *Nashville & D. R. Co. v. Jones*, 9 Heisk. 27. See two early cases in Indiana, *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339; *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436, which have been overruled in that State. *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174.

³ *Chicago & N. W. R. Co. v. Moranda*,

93 Ill. 302. The opinion reviews at length the Illinois cases, and disapproves the former rule of the court, stated in *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336, and approved in *Valtez v. Ohio & M. R. Co.*, 85 Ill. 500, which was, "When the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be . . . regarded as fellow-servants, within the meaning of this rule." It may be noted that the late Chief Justice Breese gave the opinion of the court in *Valtez v. Ohio & M. R. Co.*, which affirmed the earlier rule, and, after his death, the judge who then dissented gave the opinion of the court in *Chicago & N. W. R. Co. v. Moranda*.

⁴ In these illustrations the servant first named was injured by the other.

⁵ *Farwell v. Boston & W. R. Co.*, 4 Met. 49; *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637.

⁶ *Dow v. Kansas Pacific R. Co.*, 8 Kan. 642; *Robinson v. Houston & T. C.*

tender; ¹ brakeman and engineer; ² brakeman and servants who make up and despatch trains; ³ brakeman and road supervisor; ⁴ brakemen on the same train ⁵ or on different trains; ⁶ brakeman and flagman; ⁷ conductor and engineer; ⁸ fireman and switch-tender; ⁹ fireman and engineer; ¹⁰ watchman at a street crossing and switch-tender; ¹¹ switch-tender and engineer; ¹² a servant who couples and uncouples cars, and a conductor or engineer; ¹³ a laborer engaged in repairing or constructing the road and his foreman; ¹⁴ a laborer in a machine-shop and another employee, although having the charge and direction of the machine and work; ¹⁵ a laborer on a construction train, and its engineer or conductor; ¹⁶ a laborer engaged in filling trucks with ballast, and pushing them on temporary rails, and a servant who negligently laid an insufficient number of sleepers under the rails; ¹⁷ laborers and mechanics who work upon the road or machinery, and conductors, brakemen, and other servants moving engines upon the track or upon turn-tables; ¹⁸ laborers on the road or other

R. Co., 46 Tex. 540; *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153, 15 Barb. 574.

¹ *Slattery v. Toledo & W. R. Co.*, 23 Ind. 81.

² *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153, 15 Barb. 574; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 28 Barb. 80; *Moran v. New York Cent. & H. R. R. Co.*, 67 Barb. 96; *Illinois Cent. R. Co. v. Keen*, 72 Ill. 512; *Pittsburg, Ft. W., & C. R. Co. v. Lewis*, 33 Ohio St. 196; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.

³ *Hodgkins v. Eastern R. Co.*, 119 Mass. 419; *Rose v. Boston & A. R. Co.*, 58 N. Y. 217.

⁴ *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.

⁶ *Chicago & A. R. Co. v. Rush*, 84 Ill. 570.

⁶ *Hayes v. Western R. Co.*, 3 Cush. 270.

⁷ *Cooper v. Mil. & P. R. Co.*, 23 Wis. 668.

⁸ *Ragsdale v. Memphis & C. R. Co.*, 3 Baxter (Tenn.), 426.

⁹ *Tinney v. Boston & A. R. Co.*, 52 N. Y. 632, 62 Barb. 218.

¹⁰ *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.

¹¹ *Sammon v. New York & H. R. Co.*, 62 N. Y. 251, 38 N. Y. Superior, 414.

¹² *Columbus, C., & I. R. Co. v. Troesch*, 68 Ill. 545, 57 Ill. 155.

¹³ *Wilson v. Madison, &c. R. Co.*, 18 Ind. 226.

¹⁴ *Weger v. Penn. R. Co.*, 55 Pa. St. 460; *Hofnagle v. New York Cent. & H. R. Co.*, 55 N. Y. 608; *Zeigler v. Day*, 123 Mass. 152; *Gallagher v. Piper*, 16 C. B. n. s. 669.

¹⁵ *Hanrathy v. Northern Cent. R. Co.*, 46 Md. 280; *Murphy v. Boston & A. R. Co.*, 59 How. Pr. 197.

¹⁶ *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108; *St. Louis & S. E. R. Co. v. Britz*, 72 Ill. 256; *O'Connell v. Balt. & O. R. Co.*, 20 Md. 212.

¹⁷ *Lovegrove v. London, B., & S. C. R. Co.*, 16 C. B. n. s. 669.

¹⁸ *Coon v. Syracuse & U. R. Co.*, 5 N. Y. 492, 6 Barb. 231; *Boldt v. New York Cent. R. Co.*, 18 N. Y. 432; *Besel v. New York Cent. & H. R. R. Co.*, 70 N. Y. 171, 9 Hun, 457; *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336; *Valtez v. Ohio & M. R. Co.*, 85 Ill. 500; *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249; *Foster v. Minn. Cent. R. Co.*, 14 Minn. 860; *Rohback v. Pacific R. Co.*, 43 Mo. 187; *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528; *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149, 5 B. & S. 570. But see *Ryan v. Chicago & N. W.*

employees engaged in managing, constructing, or repairing the road while going to or returning from their work on the company's trains, whether passenger or gravel or construction trains, who are injured by the negligence of persons managing the train in which they are carried, or of another which collided with it.¹

Employees engaged in constructing or keeping in proper condition the road and machines have, in case of injuries arising from their improper construction or condition, been held to be in a common service with the employees who are engaged in operating the road, so that the company is not liable to the latter for such injuries. This has been held where brakemen, firemen, engineers, or conductors upon a train have been injured by defects in the road or machinery caused by the negligence of servants engaged in constructing or repairing, — as by defective brakes,² imperfect engines,³ the road-bed out of repair,⁴ or a defective turn-table,⁵ or leaving obstructions on the road.⁶ The liability of the company in such cases is, however, usually treated as depending, not upon the relation of the employees to each other, but upon the question whether it has used due care in providing and keeping in good condition the road and its appoint-

R. Co., 60 Ill. 171; *Pittsburg, Ft. W., & C. R. Co. v. Powers*, 74 Ill. 341; *Toledo, W., & W. R. Co. v. O'Connor*, 77 Ill. 391; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; *Chicago & N. W. R. Co. v. Bliss*, 6 Brad. (Ill.) 411; *Baltimore & O. R. Co. v. State*, 33 Md. 542.

¹ *Gillshannon v. Stony Brook R. Co.*, 10 Cush. 228; *Seaver v. Boston & M. R.*, 14 Gray, 466; *Coon v. Syracuse & U. R. Co.*, 6 N. Y. 492, 6 Barb. 231; *Ross v. New York Cent. & H. R. R. Co.*, 5 Hun, 488; *Moran v. New York Cent. & H. R. R. Co.*, 67 Barb. 96; *Ryan v. Cumberland V. R. Co.*, 23 Pa. St. 384; *Moss v. Johnson*, 22 Ill. 633; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366; *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417; *Pittsburg, Ft. W., & C. R. Co. v. Devinney*, 17 Ohio St. 197; *Kumler v. Junction R. Co.*, 33 Ohio St. 150; *Union Pacific R. Co. v. Nichols*, 8 Kan. 505; *Kansas Pacific R. Co. v. Salmon*, 11 Kan. 83; *Hutchinson v. York, N., & B. R. Co.*, 5 Exch. 343; *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291. But see *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339; *Fitzpatrick v. New Albany & S. R. Co.*, 7 Ind. 436; *Toledo,*

W., & W. R. Co. v. O'Connor, 77 Ill. 391; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239; *Russell v. Hudson River R. Co.*, 5 Duer, 39. The early Indiana cases are qualified by *Slattery v. Toledo & W. R. Co.*, 23 Ind. 81; *Columbus & I. R. Co. v. Arnold*, 31 Ind. 174.

² *Columbus & X. R. Co. v. Webb*, 12 Ohio St. 475; *Wonder v. Balt. & O. R. Co.*, 32 Md. 411, 418; *McAndrews v. Burns*, 10 Vroom, 117. But see *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492.

³ *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174; *Hard v. Vt. & C. R. Co.*, 32 Vt. 473; *Searle v. Lindsay*, 11 C. B. n. s. 428. But see *Toledo, W., & W. R. Co. v. Moore*, 77 Ill. 217.

⁴ *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *New Orleans, J., & G. N. R. Co. v. Hughes*, 49 Miss. 258; *Waller v. South Eastern R. Co.*, 2 Hurl. & C. 102. But see *Chicago, B., & Q. R. Co. v. Gregory*, 58 Ill. 272.

⁵ *Honner v. Ill. Cent. R. Co.*, 15 Ill. 550.

⁶ *Holden v. Fitchburg R. Co.*, 129 Mass. .

ments; and its duty in this regard is the same whether the work is done by its servants or by contractors.¹

Equality of Grade not material. — Equality of grade is not essential to a common service; and where the duties of employees relate to the same end, the master is not liable to servants in a subordinate position for injuries caused by the negligence of a servant to whose directions they are subject.²

Subordination in service has been treated by some authorities as having the effect to prevent the service being regarded as a common one, and to make the employer liable for injuries to servants caused by the negligence of a servant to whose control and directions they are subject. Thus, the company was held liable to an engineer or brakeman for an injury resulting from the negligence of the conductor, who directed the movements of the train. By this rule, it is required not only to exercise ordinary care in the employment of such superior servant, but is held to warrant his competency and fidelity, and the continued exercise of those qualities at all times. This modification of the general doctrine, which is peculiar to Ohio, has found little favor in other States; but it does not differ in principle from the limitation which treats superior employees as the immediate representatives of the common master, and gives to their negligence, even between servants, the same effect as if it were his own.³

¹ *Ford v. Fitchburg R. Co.*, 110 Mass. 240, 260; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Cumberland & P. R. Co. v. State*, 44 Md. 283.

² *Albro v. Agawam Canal Co.*, 6 Cush. 75; *Gilman v. Eastern R. Co.*, 13 Allen, 433; *O'Connor v. Roberts*, 120 Mass. 227; *Zeigler v. Day*, 123 Mass. 152; *Lawler v. Androscoggin R. Co.*, 62 Me. 463; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Hard v. Vt. & C. R. Co.*, 32 Vt. 463; *Coon v. Syracuse & U. R. Co.*, 5 N. Y. 492, 6 Barb. 238; *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 155, 15 Barb. 574; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 28 Barb. 80; *Warner v. Erie R. Co.*, 39 N. Y. 468; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 528; *Hofnagle v. New York Cent. & H. R. R. Co.*, 55 N. Y. 608, 1 Thomp. & C. 346; *Malone v. Hathaway*, 64 N. Y. 5; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384, 386;

Delaware & H. C. Co. v. Carroll, 89 Pa. St. 374; *O'Connell v. Balt. & O. R. Co.*, 20 Md. 212; *Cumberland C. & I. Co. v. Scally*, 27 Md. 589; *Wonder v. Balt. & O. R. Co.*, 32 Md. 411; *Thayer v. St. Louis, A., & T. H. R. Co.*, 22 Ind. 26; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174, 182; *Robinson v. Houston & T. C. R. Co.*, 46 Tex. 540; *Mobile & M. R. Co. v. Thomas*, 42 Ala. 672; *Mobile & O. R. Co. v. Smith*, 59 Ala. 245; *Wilson v. Merry*, L. R. 1 H. L. (Scotch) 326; *Feltham v. England*, L. R. 2 Q. B. 33.

³ *Little Miami R. Co. v. Stevens*, 20 Ohio, 415, 7 West. Law Jour. 369, 13 Law Reporter, 74; *Cleveland, C., & C. R. Co. v. Keary*, 3 Ohio St. 201; *Whaalan v. Mad River & L. E. R. Co.*, 8 Ohio St. 249; *Pittsburg, Ft. W., & C. R. Co. v. Devinney*, 17 Ohio St. 197; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; *Pittsburg, Ft. W., & C. R. Co. v. Lewis*, 33 Ohio St.

The Company's Negligence as distinguished from a Servant's.—The master is liable to his servant for the consequences of his own negligence or misfeasance. His breach of duty is not one of the ordinary risks of service which the employee undertakes. It may consist in employing, without due caution, incompetent or careless servants, in providing unsafe tools and structures, the deficiencies of which he knew or ought to have known, or in failing to notify the servant of peculiar dangers, known to himself, but not known to the servant.¹

The master may, by withdrawing himself from the management of his business, and putting it in the hands of another with full powers to act for him, make such substitute's act his own, and become liable for his injuries to servants in like manner as if they were personally committed by himself.² As a corporation acts only through officers and agents, it becomes in many cases a decisive question what officers or agents so stand for the corporation that their acts, negligence, or knowledge are to be deemed the acts, negligence, or knowledge of the corporation itself.³ Generally, where the personal presence of the directors and officers of the corporation is not practicable, the subordinates appointed by them are to be regarded as the servants of the corporation and fellow-servants of other employees.⁴ The question whether the agent is in law its *alter ego*, so that his act, negligence, or knowledge is to be deemed its act, negligence, or knowledge, depends much upon the question whether the function or duty involved admits of delegation, or is one for the proper performance of which the corporation must always remain responsible, irrespective of its care in the choice of intermediate agencies.⁵

196, 200; Louisville & N. R. Co. v. Collins, 2 Duvall, 114; Louisville, C., & L. R. Co. v. Cavens, 9 Bush, 559; Mann v. Oriental Print Works, 11 R. I. 152.

¹ Ryan v. Fowler, 24 N. Y. 410; Keegan v. Western R. Co., 8 N. Y. 175, 181; Connolly v. Poillon, 41 Barb. 366; Albrow v. Agawam Canal Co., 6 Cush. 75, 77; Cayzer v. Taylor, 10 Gray, 274; Walker v. Bolling, 22 Ala. 294; Cook v. Parham, 24 Ala. 21; Perry v. Marsh, 25 Ala. 659; Brothers v. Cartter, 52 Mo. 372; Buzzell v. Laconia Man. Co., 48 Me. 113; Ormond v. Holland, El., B. & El. 102; Tarrant v. Webb, 18 C. B. 797; Paterson v. Wallace, 1 Macq. 748; Brydon v. Stewart, 2 Macq.

30; Wilson v. Merry, L. R. 1 H. L. (Scotch) 326.

² Corcoran v. Holbrook, 59 N. Y. 517; Malone v. Hathaway, 64 N. Y. 5, 6 Thomp. & C. 1; Eagan v. Tucker, 18 Hun, 346; Heiner v. Heuvelman, 45 N. Y. Superior, 88; Brothers v. Cartter, 52 Mo. 372; Walker v. Bolling, 22 Ala. 294; Mullan v. Phil. & S. M. Steamship Co., 78 Pa. St. 25; McAndrews v. Burns, 10 Vroom, 117; Murphy v. Smith, 19 C. B. n. s. 361.

³ King v. Boston & W. R. Co., 9 Cush. 112.

⁴ Michigan Cent. R. Co. v. Dolan, 32 Mich. 510, 513.

⁵ Rose v. Boston & A. R. Co., 58 N. Y.

It is difficult to state the general result of the decisions which undertake to discriminate between an employee who is to be deemed a servant only, and one who is to be deemed in legal effect the master. Some have treated very subordinate employees as the immediate representatives of the company, and "have led very far towards destroying all means of discernment."¹ The more frequent test has been the power to select and discharge servants; and an agent having the power has been treated, so far as such servants are concerned, as the corporation itself.² The following are illustrations of officers and agents who have been so regarded: The directors acting as an official body;³ a general officer, agent, manager, or superintendent having the power to employ and discharge employees;⁴ an assistant superintendent;⁵ an agent having the entire charge of a distinct department;⁶ a superintendent or "boss" having the charge of the construction or repair of works upon the road, with power to employ and discharge employees;⁷ a yard-master, or head brakeman, or con-

217; *Hofnagle v. New York Cent. & H. R. Co.*, 55 N. Y. 608; *Besel v. New York Cent. & H. R. R. Co.*, 70 N. Y. 171, 9 Hun, 457; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38, 67 N. Y. 593; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Tyson v. South & N. A. R. Co.*, 61 Ala. 554; *Bridges v. St. Louis, I. M., & S. R. Co.*, 6 Mo. App. 389; *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 218.

¹ *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 510, 514.

² See cases in notes immediately following. The power to employ and discharge servants is, however, not a final test. *Crispin v. Babbitt*, 10 N. Y. Week. Dig. 512.

³ *Fifield v. Northern R. Co.*, 42 N. H. 225; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174; *Rose v. Boston & A. R. Co.*, 58 N. Y. 217, 220. See *Warner v. Erie R. Co.*, 39 N. Y. 468, 476.

⁴ *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Brickner v. New York Cent. R. Co.*, 2 Lans. 506, 49 N. Y. 672; *Hofnagle v. New York Cent. & H. R. R. Co.*, 55 N. Y. 608; *Baulec v. New York & H. R. Co.*, 59 N. Y. 356, 62 Barb. 623; *Corcoran v. Holbrook*, 59 N. Y. 517; *Malone v. Hathaway*, 64 N. Y. 5; *Besel v. New York Cent. & H. R. R. Co.*, 70 N. Y. 171,

9 Hun, 457; *Fort v. Whipple*, 11 Hun, 586; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 389; *Huntingdon & B. T. R. & Coal Co. v. Decker*, 82 Pa. St. 119, 84 Pa. St. 419; *Kansas Pacific R. Co. v. Salmon*, 11 Kan. 83; *Washburn v. Nashville & C. R. Co.*, 3 Head, 638; *Cumberland & P. R. Co. v. State*, 44 Md. 283; *Quincy Mining Co. v. Kitts*, 9 Reporter, 86. But see *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 62; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245. But see *Howells v. Landore Steel Co.*, L. R. 10 Q. B. 62.

⁵ *Colorado Cent. R. Co. v. Ogden*, 3 Col. 499; *Chicago, B., & Q. R. Co. v. McLallen*, 84 Ill. 109.

⁶ *Mullan v. Phil. & S. M. Steamship Co.*, 78 Pa. St. 25.

⁷ *Kansas Pacific R. Co. v. Little*, 19 Kan. 267; *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495; *Whalen v. Centenary Church*, 62 Mo. 326; *Cook v. Hannibal & St. J. R. Co.*, 63 Mo. 397; *Devany v. Vulcan Iron Works*, 4 Mo. App. 236; *Deppe v. Chicago, R. I., & P. R. Co.*, 38 Iowa, 592, 36 Iowa, 52; *Louisville & N. R. Co. v. Bowler*, 9 Heisk. 866; *Stevenson v. Jewett*, 16 Hun, 210. *Contra*, *Barringer v. Del. & H. C. Co.*, 19 Hun, 216;

ductor, who directs the making up of the trains and the distribution of cars, and who hires and discharges his assistants;¹ an employee with the mixed duties of engineer, superintendent, and conductor, who employs and discharges men, and has charge of a section of the road;² and a foreman having charge of the machinery or its repairs.³

Some authorities, which hold the company liable for injuries to a servant on the ground that the negligent servant who did the injury was its *alter ego*, come also within the rule that the company cannot by any delegation of authority relieve itself of its duty to use reasonable care in providing proper machinery and a safe road, and in employing a sufficient force of competent and faithful servants; and that it is liable where an employee to whom it intrusts the duty fails to perform it.⁴

The Plaintiff within the Rule only when he was the Defendant's Servant at the Time of the Injury.—The rule which excludes the servant's right of action applies only where the relation of master and servant exists. A person is liable for his servant's torts to one who, though generally employed in his service, was not at the time acting as his servant.⁵ The company is liable for its servant's torts to the servants of a contractor who is exercising an independent employment, the latter's servants not being its servants.⁶

Crispin v. Babbitt, 10 N. Y. Week. Dig. 512; Hamilton v. Iron Mt. Co., 4 Mo. App. 564; Mobile & M. R. Co. v. Smith, 59 Ala. 245.

¹ Flike v. Boston & A. R. Co., 53 N. Y. 549; Booth v. Boston & A. R. Co., 73 N. Y. 38; McCosker v. Long Island R. Co., 21 Hun, 500, 59 How. Pr. 258; Tyson v. South & N. A. R. Co., 61 Ala. 554. But see Hodgkins v. Eastern R. Co., 119 Mass. 419; Rose v. Boston & A. R. Co., 58 N. Y. 217; Besel v. New York Cent. & H. R. R. Co., 70 N. Y. 171, 9 Hun, 457.

² Dibbin v. Richmond & D. R. Co., 81 N. C. 446.

³ Brabitts v. Chicago & N. W. R. Co., 38 Wis. 289; Stevenson v. Jewett, 16 Hun, 210. But see Barringer v. Del. & H. C. Co., 19 Hun, 216; Hofnagle v. New York Cent. & H. R. R. Co., 55 N. Y. 608; Weger v. Penn. R. Co., 55 Pa. St. 460; Zeigler v. Day, 123 Mass. 152; Wilson v. Merry, L. R. 1 H. L. (Scotch) 826.

⁴ Fifield v. Northern R. Co., 42 N. H. 225; Laning v. New York Cent. R. Co., 49 N. Y. 521, 532; Baulec v. New York & H. R. Co., 59 N. Y. 356, 62 Barb. 623; Corcoran v. Holbrook, 59 N. Y. 517; Booth v. Boston & A. R. Co., 73 N. Y. 38; Stevenson v. Jewett, 16 Hun, 210; Cumberland & P. R. Co. v. State, 44 Md. 283; Lewis v. St. Louis & I. M. R. Co., 59 Mo. 495. See Gilman v. Eastern R. Co., 13 Allen, 433, 441; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 579.

⁵ Hutchinson v. York, N., & B. R. Co., 5 Exch. 343, 352; Tunney v. Midland R. Co., L. R. 1 C. P. 291, 296; Washburn v. Nashville & C. R. Co., 3 Head, 638.

⁶ Burke v. Norwich & W. R. Co., 34 Conn. 474; Young v. New York Cent. R. Co., 30 Barb. 229; Stone v. Western Trans. Co., 38 N. Y. 240; Ominger v. New York Cent. & H. R. R. Co., 6 Thomp. & C. 498; Goodfellow v. Boston, H., & E. R. Co., 106 Mass. 461; Donaldson v. Miss. & M. R. Co., 18 Iowa, 280; Abraham v. Rey-

If two companies use the same railroad or station, each, however, employing its servants independently of the other, the one company is liable for the torts of its servants to those of the other in the same manner as to strangers.¹

The company's servants cannot recover against it for injuries resulting solely from the negligence of the servants of other companies which are allowed by it, under an agreement or lease, to run their trains on its track, as its servants are presumed to have taken the risks of such negligence as one of the ordinary perils of their service.² The company has, however, been held liable to its employees for the defective road of another corporation used by it in the same manner as if the road was its own.³

A mere business connection between two companies, by which tickets are sold by each over the other's road, does not make the servants of one the co-servants of those of the other.⁴

The rule which relieves the master from liability for torts committed by one servant on another does not apply where a servant sues the master for the loss of his wife's society and services, caused by the negligence of his fellow-servant.⁵

A person who undertakes to assist a servant without the master's request cannot recover against the master for an injury caused by the servant's negligence.⁶

Negligence as to Machinery and Road.—The company, like any master, is under an obligation to its servants to use reasonable care to provide and maintain a safe road-bed, and suitable machinery, engines, cars, and other appointments of the railroad, and is liable to them for injuries resulting from defects which it knew,

nolds, 5 Hurl. & N. 143. But see *Michigan Cent. R. Co. v. Leahy*, 10 Mich. 193; *Illinois Cent. R. Co. v. Cox*, 21 Ill. 20; *Johnson v. Boston*, 118 Mass. 114; *Wiggett v. Fox*, 11 Exch. 832.

¹ *Smith v. New York & H. R. Co.*, 19 N. Y. 127, 6 Duer, 225; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Farwell v. Boston & W. R. Co.*, 4 Met. 49, 61; *Catawissa R. Co. v. Armstrong*, 49 Pa. St. 186; *Vose v. Lancashire & Y. R. Co.*, 2 Hurl. & N. 728; *Warburton v. Great Western R. Co.*, L. R. 2 Exch. 30; *Swainson v. North Eastern R. Co.*, L. R. 3 Exch. Div. 341. See *Cruty v. Erie R. Co.*, 3 Thomp. & C. 244.

² *Clark v. Chicago, B., & Q. R. Co.*, 92 Ill. 43, 2 Brad. (Ill.) 596.

³ *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497.

⁴ *Carroll v. Minn. Valley R. Co.*, 13 Minn. 30.

⁵ *Gannon v. Housatonic R. Co.*, 112 Mass. 234.

⁶ *Osborne v. Knox & L. R. Co.*, 68 Me. 49; *New Orleans, J., & G. N. R. Co. v. Harrison*, 48 Miss. 112; *Degg v. Midland R. Co.*, 1 Hurl. & N. 773; *Swainson v. North Eastern R. Co.*, L. R. 3 Exch. Div. 341, 349, 351.

or ought to have known, and could have prevented by the exercise of such care; and it is under the same duty and liability to maintain these instrumentalities in proper condition. The servant assumes the natural risks of his employment, but not those which the wrongful act of the employer has superadded.¹ But if the company exercises reasonable or ordinary care in making and continuing such provision for the safety of employees, it is not liable to them for injuries resulting from defects in the road or machinery. It does not warrant the completeness of either, and is not responsible for latent defects, except so far as they are discoverable on proper inspection. The employees are presumed to take the natural risks of injuries incident to their employment, and not arising from its negligence.² The company is not liable,

¹ *Keegan v. Western R. Co.*, 8 N. Y. 175; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Leonard v. Collins*, 70 N. Y. 90; *Besel v. New York Cent. & H. R. R. Co.*, 70 N. Y. 571; *Kain v. Smith*, 10 N. Y. Week. Dig. 176; *Cone v. D., L., & W. R. Co.*, 10 N. Y. Week. Dig. 232; *Plank v. New York Cent. & H. R. R. Co.*, 1 *Thomp. & C.* 319; *King v. New York Cent. & H. R. R. Co.*, 4 *Hun.* 769; *Cone v. Del., L., & W. R. Co.*, 15 *Hun.* 172; *Stevenson v. Jewett*, 16 *Hun.* 210; *De Forest v. Jewett*, 19 *Hun.* 509; *Noyes v. Smith*, 28 *Vt.* 59; *Mad River & L. E. R. Co. v. Barber*, 5 *Ohio St.* 541; *Lake Shore & M. S. R. Co. v. Fitzpatrick*, 31 *Ohio St.* 479; *Cumberland & P. R. Co. v. State*, 44 *Md.* 283; *Ford v. Fitchburg R. Co.*, 110 *Mass.* 240; *Harkins v. Standard Sugar Refinery*, 122 *Mass.* 400; *Hough v. Texas & P. R. Co.*, 100 *U. S.* 213; *Shanny v. Androscoggin Mills*, 66 *Me.* 420; *Fifield v. Northern R. Co.*, 42 *N. H.* 225; *Muldowney v. Ill. Cent. R. Co.*, 36 *Iowa*, 462, 39 *Iowa*, 615; *Cooper v. Central R. Co.*, 44 *Iowa*, 134; *Braun v. Chicago, R. I., & P. R. Co.*, 10 *Reporter*, 202; *Bridges v. St. Louis, I. M., & S. R. Co.*, 6 *Mo. App.* 389; *McMillan v. Union Press-Brick Works*, 6 *Mo. App.* 434; *Chicago & A. R. Co. v. Shannon*, 43 *Ill.* 338; *Chicago & N. W. R. Co. v. Swett*, 45 *Ill.* 197; *Schooner Norway v. Jensen*, 52 *Ill.* 373; *Chicago & N. W. R. Co. v. Jackson*, 55 *Ill.* 492; *Illinois Cent. R. Co. v. Patterson*, 69 *Ill.* 650; *Toledo, W., & W. R. Co. v. Fredericks*, 71 *Ill.* 294; *To-*

ledo, W., & W. R. Co. v. Moore, 77 *Ill.* 217; *Toledo, W., & W. R. Co. v. Ingraham*, 77 *Ill.* 309; *Toledo, W., & W. R. Co. v. Asbury*, 84 *Ill.* 429; *Wedgwood v. Chicago & N. W. R. Co.*, 41 *Wis.* 478, 44 *Wis.* 44; *Bessex v. Chicago & N. W. R. Co.*, 45 *Wis.* 477; *Colorado Cent. R. Co. v. Ogden*, 3 *Col.* 499; *Howd v. Miss. Cent. R. Co.*, 50 *Miss.* 178; *Brickman v. South Carolina R. Co.*, 8 *S. C.* 173; *Houston & T. R. Co. v. Oram*, 49 *Tex.* 341; *Roberts v. Smith*, 2 *Hurl. & N.* 213. The duty to fence dangerous machinery is sometimes imposed by statute. *Britton v. Great Western Cotton Co.*, *L. R.* 7 *Exch.* 130.

² *Mad River & L. E. R. Co. v. Barber*, 5 *Ohio St.* 541; *Columbus & X. R. Co. v. Webb*, 12 *Ohio St.* 475; *Indianapolis & C. R. Co. v. Love*, 10 *Ind.* 554; *Columbus & I. C. R. Co. v. Arnold*, 31 *Ind.* 174; *Grand Rapids & I. R. Co. v. Huntley*, 38 *Mich.* 237; *Harrison v. Central R. Co.*, 2 *Vroom*, 293; *Honner v. Ill. Cent. R. Co.*, 15 *Ill.* 550; *Illinois Cent. R. Co. v. Phillips*, 49 *Ill.* 234; *Columbus, C., & I. C. R. Co. v. Troesch*, 68 *Ill.* 545, 57 *Ill.* 155; *Toledo, P., & W. R. Co. v. Conroy*, 68 *Ill.* 560, 61 *Ill.* 162; *Toledo, W., & W. R. Co. v. Fredericks*, 71 *Ill.* 294; *Camp Point Man. Co. v. Ballou*, 71 *Ill.* 417; *Toledo, W., & W. R. Co. v. Ingraham*, 77 *Ill.* 309; *Chicago & A. R. Co. v. Platt*, 89 *Ill.* 141; *Indianapolis, B., & W. R. Co. v. Toy*, 91 *Ill.* 474; *Morris v. Gleason*, 1 *Brad. (Ill.)* 510; *Chicago & A. R. Co. v. Mahony*, 4 *Brad. (Ill.)* 262; *Chicago & N. W. R. Co. v.*

where it uses due care, for a mistake of judgment in the choice of machinery and mode of constructing the road;¹ or where, having used due care in employing persons to construct its road or machinery, they proved in fact incompetent;² or where, it has been held, having provided a competent inspector, he failed, in a particular instance, to perform his duty.³

The duty of the company to use reasonable care in providing proper machinery is the same, whether it purchases the machinery of others or is itself the manufacturer.⁴

The duty to use such care in providing proper machinery and a sufficient force of competent servants is not discharged by delegating it to an agent, and the company still remains responsible for its performance. "It is," as has been said, "a duty or contract to be affirmatively and positively fulfilled and performed."⁵

Scheuring, 4 Brad. (Ill.) 533; North Chicago Rolling Mills Co. v. Mopka, 4 Brad. (Ill.) 664; Price v. Henagan, 5 Brad. (Ill.) 234; Colorado Cent. R. Co. v. Ogden, 3 Col. 499; Conway v. Ill. Cent. R. Co., 50 Iowa, 465; Mobile & O. R. Co. v. Thomas, 42 Ala. 672; Smith v. St. Louis, K. C., & N. R. Co., 69 Mo. 32; Porter v. Hannibal & St. J. R. Co., 9 Reporter, 549; Wonder v. Balt. & O. R. Co., 32 Md. 411; Hanrathy v. Northern Cent. R. Co., 46 Md. 280; Baltimore & O. R. Co. v. Stricker, 51 Md. 47; Steffen v. Chicago & N. W. R. Co., 46 Wis. 259; Leonard v. Collins, 70 N. Y. 90; De Graff v. New York Cent. & H. R. R. Co., 76 N. Y. 125, 3 Thomp. & C. 255; Holden v. Fitchburg R. Co., 129 Mass. ; Potts v. Port Carlisle, D., & R. Co., 2 L. T. N. S. 283. See Webb v. Rennie, 4 Fost. & F. 608. There are authorities which go far towards carrying the liability of the company to its servants for defects in its road and other appointments, including the competency and sufficiency in number of its employees, to the full extent of its liability to third parties, or even to passengers. Snow v. Housatonic R. Co., 8 Allen, 441; Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Chicago & A. R. Co. v. Sullivan, 63 Ill. 293. See Toledo, P., & W. R. Co. v. Conroy, 68 Ill. 560, 567, 61 Ill. 162. For comments on Snow v. Housatonic R. Co., see Tinney v. Boston & A. R. Co., 62 Barb. 218, 52 N. Y. 632; Harrison v. Central R. Co., 2 Vroom, 293, 300.

¹ De Forest v. Jewett, 19 Hun, 509.

² Mansfield Coal & C. Co. v. McEnergy, 37 Leg. Int. 28.

³ Columbus & X. R. Co. v. Webb, 12 Ohio St. 475; Columbus & I. R. Co. v. Arnold, 31 Ind. 174. But see Braun v. Chicago, R. I., & P. R. Co., 10 Reporter, 202, which holds that the duty of inspection must be continuously and positively performed.

⁴ Ford v. Fitchburg R. Co., 110 Mass. 240 (explained in Holden v. Fitchburg R. Co., 129 Mass.); Shanny v. Androscoggin Mills Co., 66 Me. 420; Hough v. Texas & P. R. Co., 100 U. S. 213; Chicago & N. W. R. Co. v. Jackson, 55 Ill. 492; Toledo, W., & W. R. Co. v. Ingraham, 77 Ill. 309.

⁵ Laning v. New York Cent. R. Co., 49 N. Y. 521, 532; Brickner v. New York Cent. R. Co., 2 Lans. 506; Tinney v. Boston & A. R. Co., 52 N. Y. 632, 62 Barb. 218; Flike v. Boston & A. R. Co., 53 N. Y. 549; Besel v. New York Cent. & H. R. R. Co., 70 N. Y. 171, 9 Hun, 457; Booth v. Boston & A. R. Co., 73 N. Y. 38, 67 N. Y. 593; Kirkpatrick v. New York Cent. & H. R. R. Co., 79 N. Y. 240; Harvey v. New York Cent. & H. R. R. Co., 19 Hun, 556; Gilman v. Eastern R. Co., 13 Allen, 433, 442, 443; Ford v. Fitchburg R. Co., 110 Mass. 240; Harkins v. Standard Sugar Refinery, 122 Mass. 400, 404, 405; Cumberland & P. R. Co. v. State, 44 Md. 283; Patterson v. Pittsburg & C. R. Co., 76 Pa. St. 389; Huntingdon & B. T. R. & Coal Co. v. Decker, 82 Pa. St. 119, 84 Pa. St. 419; Hough v. Texas & P. R. Co., 100 U. S.

The company is not liable for an injury to a servant caused by the breaking of a switch, without proof that it was negligent in constructing or inspecting it.¹ It is liable to him for an injury caused by the explosion of an engine only when negligent in not discovering and removing the defect.²

The company is not liable to a servant employed upon a train for an injury from the falling of a railroad bridge caused by decay in its timbers, where the bridge was originally built in a proper manner, and the company had required it, with sufficient frequency, to be inspected by competent persons, who, in applying the customary tests, did not discover the defect.³ But it will be liable if it knew of the defect, or failed for want of a proper inspection to discover it.⁴

The company's knowledge of a defect must be proved in order to make it liable for the consequences;⁵ but such knowledge may be shown by circumstances, as the length of time it existed before the injury,⁶ or by a notice given to an employee who had an express or implied authority to receive it.⁷ The fact that the servant complained of a defect in the road or its appointment, is admissible in proof of the company's knowledge.⁸

Duty as to New Inventions.—The company's duty to its employees does not require it to adopt every new invention, even

213; *Houston & T. C. R. Co. v. Dunham*, 49 Tex. 181; *Lewis v. St. Louis, I. M., & S. R. Co.*, 59 Mo. 495; *Bridges v. St. Louis & I. M. R. Co.*, 6 Mo. App. 389. The case of *Booth v. Boston & A. R. Co.*, 73 N. Y. 38, seems to draw a distinction between the negligence of the company in not supplying a sufficient force of employees in general, and the omission of a subordinate who is in immediate charge to use it in a particular instance, to which a uniform rule could not be applied, the company being liable in the former case, but not in the latter.

¹ *King v. Boston & W. R. Co.*, 9 Cush. 112; *Ladd v. New Bedford R. Co.*, 119 Mass. 412.

² *Columbus, C., & I. C. R. Co. v. Troesch*, 68 Ill. 545, 57 Ill. 155; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Toledo, W., & W. R. Co. v. Moore*, 77 Ill. 217; *East St. Louis, P., & P. Co. v. Hightower*, 92 Ill. 139; *Indianapolis, B., & W. R. Co. v. Toy*, 91 Ill. 474; *Noyes v. Smith*, 28 Vt. 59; *Hard v. Vt. & C. R.*

Co., 32 Vt. 473; *Keegan v. Western R. Co.*, 8 N. Y. 175; *Hugh v. New Orleans & C. R. Co.*, 6 La. An. 495; *Ford v. Fitchburg R. Co.*, 110 Mass. 240.

³ *Warner v. Erie R. Co.*, 39 N. Y. 468, 49 Barb. 558; *Faulkner v. Erie R. Co.*, 49 Barb. 324; *Harrison v. Central R. Co.*, 2 Vroom, 293; *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Brothers v. Cartter*, 52 Mo. 372; *Mansfield Coal & C. Co. v. McEnery*, 37 Leg. Int. 28.

⁴ *Toledo, P., & W. R. Co. v. Conroy*, 68 Ill. 560, 61 Ill. 162.

⁵ *Columbus, C., & I. C. R. Co. v. Troesch*, 68 Ill. 545, 57 Ill. 155; *Chicago & A. R. Co. v. Platt*, 89 Ill. 141.

⁶ *Chicago & I. R. Co. v. Russell*, 91 Ill. 298; *Bridges v. St. Louis, I. M., & S. R. Co.*, 6 Mo. App. 389; *Holden v. Fitchburg R. Co.*, 129 Mass.

⁷ *Brabbitts v. Chicago & N. W. R. Co.*, 38 Wis. 289.

⁸ *Harvey v. New York Cent. & H. R. R. Co.*, 19 Hun, 556.

though such invention may diminish the risk incident to their service. It fulfils its duty to them when, without misleading them or putting them off their guard, it uses machinery and appliances which are in common use, although some other may have superior merits.¹ It may continue to use carriages, rails, and machinery which have become worn or defective, where the employee knows their condition.² It is not chargeable with negligence in using "double buffers," though their use requires employees to practise a greater degree of care to save themselves from harm.³ The company is not presumed to have a knowledge of improvements conducive to safety superior to that of an experienced mechanic employed in its shops.⁴

Negligence as to the Employment of Servants.—The company, like any master, is under an obligation to its servants to use reasonable care to associate with them fellow-servants having the ordinary care and skill required in the service to be performed, and is liable to them for injuries resulting from the negligence and incompetency of fellow-servants, which it might have prevented by the exercise of such care. This duty and liability, like that which relates to the road and its appointments, is continuing, and governs the company both in the original choice of its servants and in their discharge when they subsequently become incompetent. The master does not warrant to each servant the competency of his fellow-servants; and in case of injury to one by the other, the question, in determining the master's liability, is not only whether the wrong-doer was in fact incompetent for the service, but also whether the master failed to exercise ordinary care in employing him; and both the default of the ser-

¹ *Wonder v. Balt. & O. R. Co.*, 32 Md. 411; *Smith v. St. Louis, K. C., & N. R. Co.*, 69 Mo. 32; *Cagney v. Hannibal & St. J. R. Co.*, 69 Mo. 416; *Baldwin v. Chicago, R. I., & P. R. Co.*, 50 Iowa, 680; *Piper v. New York Cent. & H. R. R. Co.*, 1 Thomp. & C. 290; *Salters v. Del. & H. C. Co.*, 3 Hun, 338; *Ladd v. New Bedford R. Co.*, 119 Mass. 412; *Osborne v. Knox & L. R. Co.*, 68 Me. 49; *Dynen v. Leach*, 26 L. J. n. s. Exch. 221. But see *Smith v. New York & H. R. Co.*, 19 N. Y. 127, 6 Duer, 227; *Dorsey v. Phillips & C. Const.*

Co., 42 Wis. 583; *Toledo, W., & W. R. Co. v. Asbury*, 84 Ill. 429.

² *Hayden v. Smithville Man. Co.*, 29 Conn. 548; *Kelley v. Silver Spring Co.*, 12 R. I. 112; *Fort Wayne, J., & S. R. Co. v. Gildersleeve*, 33 Mich. 133; *Michigan Cent. R. Co. v. Austin*, 40 Mich. 247; *International & G. N. R. Co. v. Doyle*, 49 Tex. 190.

³ *Indianapolis, B., & W. R. Co. v. Flanigan*, 77 Ill. 365; *Baldwin v. Chicago, R. I., & P. R. Co.*, 50 Iowa, 680.

⁴ *Cagney v. Hannibal & St. J. R. Co.*, 69 Mo. 416.

vant and such want of ordinary care in the master must concur to render him liable for the injury.¹

Intemperate and Negligent Servants. — The company is liable for injuries to a servant caused by the intemperance of another servant, whose habits it knows or ought to have known, whether they existed when he was first employed or were subsequently contracted.² If the injured servant knew that the fellow-servant had the habit, and did not report or object to it, he would be deemed to have assumed the risk therefrom.³ Good character and proper qualifications are, however, presumed to continue; and if a servant was satisfactory in these respects when he entered the service, some proof should be given in an action against the company for an injury alleged to be caused by his want of sobriety or fitness, that the company knew or ought to have known the change.⁴ Intoxication when not on duty is not material.⁵ Unfitness at the time of appointment is also presumed to continue.⁶ The company is not required to discharge a servant merely for a single act of negligence.⁷

¹ *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 28 Barb. 80; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521 (commenting on *Wright v. New York Cent. R. Co.*); *Baulec v. New York & H. R. Co.*, 59 N. Y. 356, 62 Barb. 623; *Chapman v. Erie R. Co.*, 55 N. Y. 579, 1 Thomp. & C., 526; *Besel v. New York Cent. & H. R. R. Co.*, 70 N. Y. 171, 9 Hun, 457; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38, 67 N. Y. 593; *Cumberland & P. R. Co. v. State*, 44 Md. 283; *Union Pacific R. Co. v. Milliken*, 8 Kan. 647; *Kansas Pacific R. Co. v. Salmon*, 14 Kan. 512, 11 Kan. 83; *Union Pacific R. Co. v. Young*, 19 Kan. 488, 8 Kan. 658; *Cooper v. Mil. & P. R. Co.*, 23 Wis. 668; *Ala. & F. R. Co. v. Waller*, 48 Ala. 459; *Mobile & M. R. Co. v. Smith*, 59 Ala. 245; *Tyson v. South & N. A. R. Co.*, 61 Ala. 554; *Illinois Cent. R. Co. v. Jewell*, 46 Ill. 99; *Columbus, C., & C. R. Co. v. Troesch*, 68 Ill. 545, 57 Ill. 155; *Mich. Cent. R. Co. v. Dolan*, 32 Mich. 510; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104; *Weger v. Penn. R. Co.*, 55 Pa. St. 460; *Huntingdon & B. T. R. Co. v. Decker*, 82 Pa. St. 119, 84 Pa. St. 419; *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567, 44 Mo. 488; *Moss v. Pacific R. Co.*, 49

Mo. 167; *Bassett v. Norwich & W. R. Co.* (Superior Ct. Conn.), 19 Law Rep. 551; *Howd v. Miss. Cent. R. Co.*, 50 Miss. 178; *Blake v. Maine Cent. R. Co.*, 70 Me. 60; *Jordan v. Wells*, 3 Woods, 527; *Quincy Mining Co. v. Kitts*, 9 Reporter, 86; *Tarrant v. Webb*, 18 C. B. 797; *Hutchinson v. York, N., & B. R. Co.*, 5 Exch. 343, 353; *Feltham v. England*, L. R. 2 Q. B. 33; *Potts v. Port Carlisle, D., & R. Co.*, 2 L. T. N. s. 283.

² *Gilman v. Eastern R. Co.*, 13 Allen, 433, 10 Allen, 232; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Chicago & A. R. Co. v. Sullivan*, 63 Ill. 293; *Huntingdon & B. T. R. Co. v. Decker*, 84 Pa. St. 419, 82 Pa. St. 119.

³ *Chicago & A. R. Co. v. Rush*, 84 Ill. 570.

⁴ *Union Pacific R. Co. v. Milliken*, 8 Kan. 647; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Chapman v. Erie R. Co.*, 55 N. Y. 579, 1 Thomp. & C. 526; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Blake v. Maine Cent. R. Co.*, 70 Me. 60.

⁵ *Chicago & A. R. Co. v. Rush*, 84 Ill. 570.

⁶ *Crandall v. M'Irath*, 24 Minn. 127.

⁷ *Baulec v. New York & H. R. Co.*, 62 Barb. 623, 59 N. Y. 356, 363; *Michigan Cent. R. Co. v. Dolan*, 32 Mich. 510.

The promotion of a servant who has experience in one grade to a higher grade is not evidence of negligence.¹ The company may detail a servant to act temporarily in another than his usual capacity, if he is fit for the duty to which he is so detailed;² but it is deemed negligent if it assigns a servant engaged in one service to another for which he is not competent.³

Adequate Force of Employees. — The company is bound to use reasonable care to provide a force of employees sufficient in number for the working of its trains and machinery.⁴ The servant, however, by continuing in his place with knowledge of the inadequacy of the force, is presumed to accept the risk.⁵

Various Duties of the Company. — Various duties to servants, some general in their application, and others affected by particular circumstances, have been stated as binding on railroad companies, viz.: To notify servants of peculiar dangers which are not known or obvious to them, but known to the company's officers, the notice to be adapted to the immaturity and inexperience of the servant;⁶ to notify him of particular hazards where it has given assurance that it would do so;⁷ to notify him, when employed on the track, of changes in trains, as to time of starting and rate of speed;⁸ to make and conform to rules for the safety of servants, as to time-tables and otherwise, as far as practicable;⁹

¹ *Haskin v. New York Cent. & H. R. Co.*, 65 Barb. 129.

² *Robinson v. Houston & T. C. R. Co.*, 46 Tex. 540; *Tinney v. Boston & A. R. Co.*, 52 N. Y. 632, 62 Barb. 218.

³ *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567, 44 Mo. 488.

⁴ *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 562; *Stoddard v. St. Louis, K. C., & N. R. Co.*, 65 Mo. 514; *Booth v. Boston & A. R. Co.*, 73 N. Y. 38, 67 N. Y. 593; *Harvey v. New York Cent. & H. R. Co.*, 19 Hun, 556. See *Indianapolis, B., & W. R. Co. v. Carr*, 35 Ind. 510; *Hayes v. Western R. Co.*, 3 Cush. 270.

⁵ See *post*, p. 380.

⁶ *Perry v. Marsh*, 25 Ala. 659; *Hayden v. Smithville Man. Co.*, 29 Conn. 548; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *O'Connor v. Adams*, 120 Mass. 427; *Lake Shore & M. S. R. Co. v. Fitz-*

patrick, 31 Ohio St. 479; *Paulmier v. Erie R. Co.*, 5 Vroom, 151; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Costello v. Judson*, 21 Hun, 396.

⁷ *Bradley v. New York Cent. R. Co.*, 62 N. Y. 99.

⁸ *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 805.

⁹ *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461; *Pittsburg, Ft. W., & C. R. Co. v. Powers*, 74 Ill. 341; *Chicago, B., & Q. R. Co. v. McLallen*, 84 Ill. 109; *Kansas Pacific R. Co. v. Salmon*, 14 Kan. 512, 11 Kan. 83; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 28 Barb. 80; *Rose v. Boston & A. R. Co.*, 58 N. Y. 217; *Besel v. New York Cent. & H. R. Co.*, 70 N. Y. 171, 9 Hun, 457; *Baltimore & O. R. Co. v. Woodward*, 41 Md. 268; *Vose v. Lancashire & Y. R. Co.*, 2 Hurl. & N. 728.

to keep the track from being blocked by snow and ice,¹ and to inspect it after freshets and storms;² to keep it clear of objects and structures lying near or projecting over it which expose employees to unnecessary danger;³ and to care humanely for injured employees immediately after an injury.⁴ The liability of the company for such defects and omissions will be affected, as elsewhere seen, by the servant's knowledge of their existence.⁵

Negligence of the Injured Servant. — The servant cannot recover where his own want of ordinary care has contributed to the injury, or where by the exercise of ordinary care he might have avoided it;⁶ but an impracticable degree of care is not required of him.⁷ His negligence may consist in a reckless exposure of himself,⁸ as in an attempt to get upon a train when running at a speed which makes the attempt dangerous;⁹ or leaving a box-

¹ *Fifield v. Northern R. Co.*, 42 N. H. 225.

² *Harly v. North Carolina Cent. R. Co.*, 74 N. C. 734, 76 N. C. 5.

³ *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; *Chicago, B., & Q. R. Co. v. Gregory*, 58 Ill. 272; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298; *Dorsey v. Phillips & C. Const. Co.*, 42 Wis. 583. But see, as to the effect of the servant's knowledge of the obstruction, *Gibson v. Erie R. Co.*, 63 N. Y. 449, 5 Hun, 31; *Lovejoy v. Boston & L. R. Co.*, 125 Mass. 79.

⁴ *Northern Cent. R. Co. v. State*, 29 Md. 420; *Baltimore & O. R. Co. v. State*, 41 Md. 268.

⁵ *Post*, p. 380; *Gibson v. Erie R. Co.*, 63 N. Y. 449, 5 Hun, 31.

⁶ *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 534; *Sprong v. Boston & A. R. Co.*, 58 N. Y. 56, 66 Barb. 30; *Sammon v. New York & H. R. Co.*, 62 N. Y. 251; *Gibson v. Erie R. Co.*, 63 N. Y. 449, 5 Hun, 31; *Snow v. Housatonic R. Co.*, 8 Allen, 44; *Osborn v. Knox & L. R. Co.*, 68 Me. 49; *Mulherrin v. Del., L., & W. R. Co.*, 81 Pa. St. 366; *Baltimore & O. R. Co. v. State*, 41 Md. 268, 298; *Illinois Cent. R. Co. v. Patterson*, 69 Ill. 650; *St. Louis & S. E. R. Co. v. Britz*, 72 Ill. 256; *Illinois Cent. R. Co. v. Houck*, 72 Ill. 285; *Chicago & N. W. R. Co. v. Donahue*, 75 Ill. 106; *Foster v. Chicago & A. R. Co.*, 84 Ill. 164; *Toledo, W., & W. R. Co. v. Asbury*, 84 Ill. 429; *Chicago & A. R. Co. v. Rush*, 84

Ill. 570; *Illinois Cent. R. Co. v. Modglin*, 85 Ill. 481; *Toledo, W., & W. R. Co. v. Black*, 88 Ill. 112; *Illinois Cent. R. Co. v. Patterson*, 93 Ill. 290; *Penn. Co. v. Hankey*, 93 Ill. 580; *Price v. Henagan*, 5 Brad. (Ill.) 234; *Kroy v. Chicago, R. I., & P. R. Co.*, 32 Iowa, 357; *Doggett v. Ill. Cent. R. Co.* 34 Iowa, 284; *Muldowney v. Ill. Cent. R. Co.*, 39 Iowa, 615, 36 Iowa, 462; *Baird v. C. R. I. & P. R. Co.*, 7 Northwest. Rep. 496; *Colorado Cent. R. Co. v. Ogden*, 3 Col. 499; *Wedgwood v. Chicago & N. W. R. Co.*, 44 Wis. 44, 41 Wis. 478; *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477; *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 805; *Vicksburg & M. R. Co. v. Wilkins*, 47 Miss. 404; *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637; *Evans v. Atlantic & P. R. Co.*, 62 Mo. 49; *Crutchfield v. Richmond & D. R. Co.*, 78 N. C. 300, 76 N. C. 320; *Louisville & N. R. Co. v. Burke*, 6 Cold. 45; *Central R. Co. v. Sears*, 61 Ga. 279; *Atlantic & W. P. R. Co. v. Webb*, 61 Ga. 586; *Kenney v. Central R. Co.*, 61 Ga. 590; *Senior v. Ward*, 1 El. & E. 385; *Dynen v. Leach*, 26 L. J. Exch. 221.

⁷ *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa, 31.

⁸ *O'Neill v. Keokuk & D. M. R. Co.*, 45 Iowa, 546; *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 805; *Brown v. Byroads*, 47 Ind. 435.

⁹ *Timmons v. Cent. O. R. Co.*, 6 Ohio St. 105; *Lake Shore & M. S. R. Co. v. Roy*, 5 Brad. (Ill.) 82.

car in which he is carried to his work, and of his own choice riding upon the pilot or cow-catcher.¹ If among different modes of performing his duty, some of which are safe, he chooses one which unnecessarily exposes him to danger, he takes the risk of his choice, although other servants do likewise.² It is his duty to obey the company's instructions and rules,³ and to report defects in machinery under his charge, which he knows or with reasonable diligence would have known,⁴ or the habitual incompetency of fellow-servants associated with him;⁵ and his breach of duty when contributing to the injury is a defence to his action. Some acts which in an intruder would be negligence, are not such when done by the servant in the usual and prudent discharge of his duty, as walking on the track, or stepping on it when a train is coming, or going between or under the cars.⁶ Obedience to the instructions of an agent or servant of the company, under whose charge he was placed, is not negligence.⁷ A servant's violation of the regulations, although intentional, does not affect his right of action against the company, unless it contributes to the injury.⁸

Detail of a Servant for a Dangerous Duty outside of his Employment. — The rule which relieves a master from liability for an injury to his servant resulting from the negligence of his fellow-servants has been held in some cases not to apply where the injured servant was, without proper notice of the increased risk,

¹ *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439.

² *Kroy v. Chicago, R. I., & P. R. Co.*, 32 Iowa, 357; *Chicago & N. W. R. Co. v. Bliss*, 6 Brad. (Ill.) 411.

³ *Wolsey v. Lake Shore & M. S. R. Co.*, 33 Ohio St. 227; *Wood v. New York Cent. & H. R. R. Co.*, 70 N. Y. 195; *Lyon v. Detroit, L., & L. M. R. Co.*, 31 Mich. 429; *Shanny v. Androscoggin Mills*, 66 Me. 420, 429; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Hubgh v. New Orleans & C. R. Co.*, 6 La. An. 495; *Lake Shore & M. S. R. Co. v. Roy*, 5 Brad. (Ill.) 82.

⁴ *Illinois Cent. R. Co. v. Jewell*, 46 Ill. 99; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Toledo, W., & W. R. Co. v. Eddy*, 72 Ill. 138; *Richardson v. Cooper*, 88 Ill. 270; *Crutchfield v. Richmond & D. R. Co.*, 76 N. C. 320, 78 N. C. 300;

Johnson v. Richmond & D. R. Co., 81 N. C. 453; *Le Clair v. St. Paul & P. R. Co.*, 20 Minn. 9; *McMillan v. Saratoga & W. R. Co.*, 20 Barb. 449.

⁵ *Chicago & A. R. Co. v. Rush*, 84 Ill. 570; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104.

⁶ *Berry v. Central R. Co.*, 40 Iowa, 564; *Steele v. Central R. Co.*, 43 Iowa, 109; *Snow v. Housatonic R. Co.*, 8 Allen, 441. See *Chicago & N. W. R. Co. v. Donahue*, 75 Ill. 106; *Mulherrin v. Del., L., & W. R. Co.*, 81 Pa. St. 366.

⁷ *Greenleaf v. Ill. Cent. R. Co.*, 29 Iowa, 14; *Frandsen v. Chicago, R. I., & O. R. Co.*, 36 Iowa, 372; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205.

⁸ *Ford v. Fitchburg R. Co.*, 110 Mass. 240.

put by a superior agent to do a service outside of, and more dangerous than, the employment for which he was engaged. This exception has been particularly applied to the employment of persons of immature judgment.¹ It would not be negligence to put a servant to a service of more than usual danger, when required for a good reason, as for the safety of passengers.²

Negligence of a Fellow-servant combining with the Company's. — If the company has been negligent in providing and maintaining a proper road and machinery, and an injury has resulted to a servant thereby, he has a right of action, although the negligence of a fellow-servant may have contributed to the injury.³

Knowledge of the Defects in Road and Machinery, and of the Character of Fellow-servants. — A servant who before the injury had knowledge of the defect in the road or machinery, or of the character of the fellow-servant as a careless or unskilful one, or who, having a reasonable opportunity to inform himself, ought to have known such defects or incompetency, is presumed, by remaining in the company's service, to have assumed the risks of such voluntary exposure of himself, and cannot recover for an injury resulting therefrom; and his knowledge has the same effect whether the company or master was informed or ignorant of such defect or incompetency.⁴ This rule applies

¹ *Union Pacific R. Co. v. Fort*, 17 Wall. 553, 2 Dillon, 259; *Lalor v. Chicago, B., & Q. R. Co.*, 52 Ill. 401; *Chicago & G. E. R. Co. v. Harney*, 28 Ind. 28; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205; *Hurst v. Chicago, R. I., & P. R. Co.*, 49 Iowa, 76; *Mann v. Oriental Print Works*, 11 R. I. 152. See *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *Hawley v. Northern Cent. R. Co.*, 17 Hun, 115; *Hanrathy v. North Cent. R. Co.*, 46 Md. 280.

² *Campbell v. Chicago, R. I., & P. R. Co.*, 45 Iowa, 76.

³ *Cayzer v. Taylor*, 10 Gray, 274; *Paulmier v. Erie R. Co.*, 5 Vroom, 151; *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497. See *Durgin v. Munson*, 9 Allen, 396.

⁴ *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 562, 563, 565; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 28

Barb. 80; Laning v. New York Cent. R. Co., 49 N. Y. 521; *Gibson v. Erie R. Co.*, 63 N. Y. 449, 5 Hun, 31; *Mehan v. Syracuse, B., & N. Y. R. Co.*, 73 N. Y. 585; *De Forest v. Jewett*, 19 Hun, 509; *De Graff v. New York Cent. & H. R. R. Co.*, 3 Thomp. & C. 255; *Sullivan v. India Man. Co.*, 113 Mass. 396; *Ladd v. New Bedford R. Co.*, 119 Mass. 412; *Hayden v. Smithville Man. Co.*, 29 Conn. 548; *Kelley v. Silver Spring Co.*, 12 R. I., 112; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104; *Mansfield Coal & C. Co. v. McEnery*, 37 Leg. Int. 28; *Buzzell v. Laconia Man. Co.*, 48 Me. 113; *Indianapolis & C. R. Co. v. Love*, 10 Ind. 554; *Thayer v. St. Louis, A., & T. H. R. Co.*, 22 Ind. 26; *Camp Point Man. Co. v. Ballou*, 71 Ill. 417; *Chicago & N. W. R. Co. v. Ward*, 61 Ill. 130; *St. Louis & S. E. R. Co. v. Britz*, 72 Ill. 256; *Chicago & A. R. Co. v. Rush*, 84 Ill. 570; *Chicago & A. R. Co. v. Monroe*, 85 Ill. 25; *Penn. Co. v.*

with special force when the defect or danger is obvious to the senses.¹

A servant who knows the defect and peril takes the risk of the use of dangerous implements;² or of an inadequate force of servants of a particular class on the trains;³ or of regulations as to the running of trains;⁴ or of services of peculiar peril which he undertakes, and dangerous practices in which he participates;⁵ or of injuries resulting from the projecting roof of a station-house,⁶ or from bridges which are too low to allow him to ride standing upright on the top of the train;⁷ and he is ordinarily chargeable from the fact of his entering his employment with knowledge of the height of such bridges, without notice or warning from the company.⁸ If he knows generally that there are obstructions or projecting objects of a certain kind, he is presumed to be informed of a particular one which caused the injury.⁹ Whether the servant is affected with knowledge of the obstruction is a question for the jury.¹⁰

The knowledge from which it will be presumed that the ser-

Lynch, 90 Ill. 333; *Morris v. Gleason*, 1 Brad. (Ill.) 510; *Lake Shore & M. S. R. Co. v. Roy*, 5 Brad. (Ill.) 82; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105, 125; *Muldowney v. Ill. Cent. R. Co.*, 39 Iowa, 615, 36 Iowa, 462; *Way v. Ill. Cent. R. Co.*, 40 Iowa, 341; *Perigo v. Chicago, R. I., & P. R. Co.*, 52 Iowa, 276; *Vicksburg & M. R. Co. v. Wilkins*, 47 Miss. 404; *Cummings v. Collins*, 61 Mo. 520; *Smith v. St. Louis, K. C., & N. R. Co.*, 69 Mo. 32; *Porter v. Hannibal & St. J. R. Co.*, 9 Reporter, 549; *Johnson v. Western & A. R. Co.*, 55 Ga. 133; *Robinson v. Houston & T. C. R. Co.*, 46 Tex. 540; *International & G. N. R. Co. v. Doyle*, 49 Tex. 190; *Crutchfield v. Richmond & D. R. Co.*, 78 N. C. 300, 76 N. C. 320; *McGlynn v. Brodie*, 31 Cal. 376; *Dillon v. Union Pacific R. Co.*, 3 Dill. 319; *Williams v. Clough*, 3 Hurl. & N. 258; *Clarke v. Holmes*, 7 Hurl. & N. 937, 943; *Dynen v. Leach*, 26 L. J. Exch. 221; *Skip v. Eastern Counties R. Co.*, 9 Exch. 223; *Woodley v. Metropolitan Dist. R. Co.*, L. R. 2 Exch. Div. 384; *Rattray v. Cork & M. R. Co.*, 4 L. R. (Ir.) 386; *Hoey v. Dublin & B. J. R. Co.*, Ir. R. 5 C. L. 206. But see *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495; *Porter v. Hannibal & St. J. R. Co.*, 60 Mo. 160.

¹ *Cagney v. Hannibal & St. J. R. Co.*, 69 Mo. 416; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47.

² *Chicago & A. R. Co. v. Mahoney*, 4 Brad. (Ill.) 262.

³ *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541; *Chicago & N.W. R. Co. v. Donahue*, 75 Ill. 106; *Baltimore & O. R. Co. v. State*, 41 Md. 268; *Georgia R. & B. Co. v. McDade*, 59 Ga. 73; *Skip v. Eastern Counties R. Co.*, 9 Exch. 223.

⁴ *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 28 Barb. 80.

⁵ *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81; *Lake Shore & M. S. R. Co. v. Knittel*, 33 Ohio St. 468; *Kroy v. Chicago, R. I., & P. R. Co.*, 32 Iowa, 357.

⁶ *Gibson v. Erie Co.*, 63 N. Y. 449, 5 Hun, 31.

⁷ *Owen v. New York Cent. R. Co.*, 1 Lans. 108; *Baltimore & O. R. Co. v. Stricker*, 51 Md. 47; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Pittsburg & C. R. Co. v. Sentmeyer*, 37 Leg. Int. 194.

⁸ *Baylor v. Del., L., & W. R. Co.*, 11 Vroom, 23.

⁹ *Lovejoy v. Boston & L. R. Co.*, 125 Mass. 79.

¹⁰ *Hawley v. Northern Cent. R. Co.*, 17 Hun, 116, 22 Albany L. J. 433.

vant took the risk must be such as will put him on his guard, and mere knowledge of a defect which does not inform him of the hazards is not conclusive that he assumed the risk or was negligent.¹ The servant has been held not to be affected with such knowledge where he had a right to suppose the defect to be temporary in its character.²

It is the duty of the company, by renewing and repairing its machinery at proper intervals, to guard the servant against risks of which he has not been informed, or has not the means of informing himself. The company knows the length of time that its machinery has been in use, and the wear to which it has been subjected, and a servant who comes into its employ is not presumed to know these facts about machinery already in use.³ The servant is not bound to search for latent defects in the machinery.⁴

The servant's risk continues if he remains in the service after giving notice to the company of the defect.⁵ It has been suggested, and in some jurisdictions held, that if upon such notice the master assures the servant that he will remove the defect, and the servant continues in the employment on such assurance, he is presumed not to have waived the defect, and may maintain an action against the master for an injury caused by it.⁶ It is difficult to see how the assurance can thus operate, unless it affects

¹ *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Shanney v. Androscoggin Mills*, 66 Me. 420, 427; *Kelly v. Silver Springs*, 12 R. I. 112, 118; *Lake Shore & M. S. R. Co. v. Fitzpatrick*, 31 Ohio St. 479; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Mehan v. Syracuse, B., & N. Y. R. Co.*, 73 N. Y. 521; *Hawley v. Northern Cent. R. Co.*, 17 Hun, 115, 22 A. L. J. 433; *Greenleaf v. Ill. Cent. R. Co.*, 29 Iowa, 14; *Greenleaf v. Dubuque & S. C. R. Co.*, 33 Iowa, 52; *Dale v. St. Louis, K. C., & N. R. Co.*, 63 Mo. 455; *Stoddard v. St. Louis, K. C., & N. R. Co.*, 65 Mo. 514; *Bridges v. St. Louis, I. M., & S. R. Co.*, 6 Mo. App. 389; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 389; *Colorado Cent. R. Co. v. Ogden*, 3 Col. 499, 504; *Dorsey v. Phillips & C. Const. Co.*, 42 Wis. 583; *Le Clair v. St. Paul & P. R. Co.*, 20 Minn. 9; *Britton v.*

Great Western Cotton Co., L R. 7 Exch. 130.

² *Ladd v. New Bedford R. Co.*, 119 Mass. 412, 414.

³ *Baker v. Allegheny Valley R. Co.*, 10 Reporter, 672; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Toledo, W., & W. R. Co. v. Ingraham*, 77 Ill. 309; *Braun v. Chicago, R. I., & P. R. Co.*, 10 Reporter, 202.

⁴ *Porter v. Hannibal & St. J. R. Co.*, 9 Reporter, 549.

⁵ *Colorado Cent. R. Co. v. Ogden*, 3 Col. 499, 505; *Crutchfield v. Richmond & D. R. Co.*, 78 N. C. 300, 76 N. C. 320. *Contra*, *Mansfield Coal & C. Co. v. McEnery*, 37 Leg. Int. 28.

⁶ *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Kelley v. Silver Spring Co.*, 12 R. I. 112; *Colorado Cent. R. Co. v. Ogden*, 3 Col. 499; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 389; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Belair v. Chicago & N. W. R. Co.*, 43 Iowa,

the servant's knowledge of the danger, by leading him to believe, when he is next exposed to it, that it has been removed, or by putting him in some way off his guard.¹

The notice or facts from which knowledge is inferred in the case of a person whose faculties are fully developed, and who is acquainted with the service he is to perform, or with the dangerous character of the machinery, may not affect with knowledge a person of immature judgment and wanting in the experience which would direct his attention to the hazards, and put him on his guard.²

Burden of Proof.—The burden of proof is on the servant to show that the company was negligent,³ and that his own negligence did not contribute to the injury;⁴ and where the injury was caused by defects in the road or its appointments, that the company knew or ought to have known them, or negligently employed incompetent persons to construct or repair them;⁵ and where it is alleged to have been caused by the incompetency of fellow-servants, that the servant was incompetent, and the com-

662; *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528; *Conroy v. Vulcan Iron Works*, 6 Mo. App. 102, 62 Mo. 35; *Clarke v. Holmes*, 7 Hurl. & N. 937, 6 Hurl. & N. 349; *Holmes v. Worthington*, 2 Fost. & F. 533. Compare *Fort Wayne, J., & S. R. Co. v. Gildersleeve*, 33 Mich. 133.

¹ See *Marquette, H., & O. R. Co. v. Spear*, 6 Northwest. Rep. 202.

² *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Sullivan v. India Man. Co.*, 113 Mass. 396; *O'Connor v. Adams*, 120 Mass. 427; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205, 212; *Hill v. Gust*, 55 Ind. 45; *Johnson v. Bruner*, 61 Pa. St. 58; *Union Pacific R. Co. v. Fort*, 17 Wall. 553; *Dowling v. Allen*, 6 Mo. App. 195; *Bridges v. St. Louis, I. M., & S. R. Co.*, 6 Mo. App. 389; *Grizzle v. Frost*, 3 Fost. & F. 622.

³ *Steffen v. Chicago & N. W. R. Co.*, 46 Wis. 259; *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672; *Way v. Ill. Cent. R. Co.*, 40 Iowa, 341; *Price v. Henagan*, 5 Brad. (Ill.) 234; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521, 529; *Beaulieu v. Portland Co.*, 48 Me. 291; *Atlanta & R. A. L. R. Co. v. Campbell*, 56 Ga. 586, 53 Ga. 488; *Columbus & X. R. Co. v. Webb*,

12 Ohio St. 475, 496; *Rose v. Boston & A. R. Co.*, 58 N. Y. 217; *Henry v. Staten Island R. Co.*, 10 N. Y. Week. Dig. 430.

⁴ *Way v. Ill. Cent. R. Co.*, 40 Iowa, 341; *Illinois Cent. R. Co. v. Houck*, 72 Ill. 285; *Mad River & L. E. R. Co. v. Barber*, 5 Ohio St. 541, 568; *Belair v. Chicago & N. W. R. Co.*, 43 Iowa, 662; *Central R. & B. Co. v. Kelly*, 58 Ga. 107; *Georgia, R., & B. Co. v. Kenney*, 58 Ga. 485; *Central, R., & B. Co. v. Sears*, 59 Ga. 436. *Contra*, *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 805; *Hough v. Texas & P. R. Co.*, 100 U. S. 213.

⁵ *McMillan v. Saratoga & W. R. Co.*, 20 Barb. 449; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 566; *Gilman v. Eastern R. Co.*, 10 Allen, 233, 239, 13 Allen, 433; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105; *East St. Louis P. & P. Co. v. Hightower*, 92 Ill. 139; *Mansfield Coal & C. Co. v. McEnery*, 37 Leg. Int. 28. As to what agent or employee is competent to receive notice which will bind the company, see *Locke v. Sioux City & P. R. Co.*, 46 Iowa, 109; *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672; *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495.

pany knew or ought to have known of such incompetency ;¹ and he must show that he did not himself, before the injury, know of such defects or incompetency.² The company's negligence is not to be inferred from the fact of injury by a collision of trains, or by an explosion of engines, even in jurisdictions where negligence is implied from the collision or explosion in case of injuries to passengers or third persons.³

Evidence.—Evidence of a servant's reputation as a careless or unskilful one is admissible to show the company's knowledge of his character.⁴ The evidence of the reputation of a machine as a defective one has been admitted.⁵ Evidence of specific acts of negligence of the servant, where conduct is in question, is admissible, if communicated to the company before the injury ; but not otherwise.⁶ The declarations of a general agent of the company, having power to discharge the servant by whose alleged negligence the injury occurred, are admissible to prove such agent's knowledge of the servant's incompetency.⁷ Proof of the servant's subsequent discharge from the company's service is not admissible.⁸ The instructions to servants as to the use of machinery are admissible in the master's favor, although not known to the injured servant.⁹

The company may maintain an action against a servant for injuries to its property caused by his negligence.¹⁰

A servant is liable for injuries resulting from his negligence to a fellow-servant.¹¹

¹ *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 28 Barb. 80 ; *Columbus, C., & I. C. R. Co. v. Troesch*, 68 Ill. 545, 57 Ill. 155 ; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105 ; *Murphy v. Iron Mountain R. Co.*, 10 Cent. L. J. 377 ; *Allen v. New Gas Co.*, L. R. 1 Exch. Div. 251.

² *Belair v. Chicago & N. W. R. Co.*, 43 Iowa, 662.

³ *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672 ; *Illinois Cent. R. Co. v. Houck*, 72 Ill. 285 ; *Toledo, W., & W. R. Co. v. Moore*, 77 Ill. 217 ; *Kansas Pacific R. Co. v. Salmon*, 11 Kan. 88.

⁴ *Gilman v. Eastern R. Co.*, 13 Allen, 433, 10 Allen, 282 ; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105 ; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104. But see *Haskin v. New York Cent. & H. R. R. Co.*, 65 Barb. 129.

⁵ *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338.

⁶ *Pittsburg, Ft. W., & C. R. Co. v. Ruby*, 38 Ind. 294 ; *Baulec v. New York & H. R. Co.*, 59 N. Y. 356, 62 Barb. 623 ; *Couch v. Watson Coal Co.*, 46 Iowa, 17 ; *Davis v. Detroit & M. R. Co.*, 20 Mich. 105, 123 ; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338. See *Lee v. Detroit Bridge & Iron Works*, 62 Mo. 565 ; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104.

⁷ *Laning v. New York Cent. & H. R. R. Co.*, 49 N. Y. 521.

⁸ *Couch v. Watson Coal Co.*, 46 Iowa, 17.

⁹ *Durgin v. Munson*, 9 Allen, 396.

¹⁰ *Mobile & M. R. Co. v. Clanton*, 59 Ala. 392.

¹¹ *Hinds v. Harbou*, 58 Ind. 121 ; *Hinds v. Overacker*, 66 Ind. 547 ; *Griffiths v. Wolfram*, 22 Minn. 185 ; *Osborne v. Morgan*, 130 Mass. .

Negligence, a Question for the Jury. — The question whether the company's negligence caused the injury, and whether the servant's negligence contributed to it, and whether he was chargeable with knowledge of the defect, is for the jury.¹ But if there is no evidence on which a verdict for the plaintiff can be sustained, a nonsuit should be ordered;² or the verdict, when clearly against evidence, may be set aside.³ Whether the servant receiving the injury and the servant causing it were fellow-servants is for the jury, under the instructions of the court.⁴

Pleading. — Where the gist of the action is the company's negligence in not employing competent servants, its negligence in that regard must be distinctly alleged.⁵

¹ *Laning v. New York Cent. R. Co.*, 49 N. Y. 521; *Sammon v. New York & H. R. Co.*, 62 N. Y. 251; *Hawley v. Northern Cent. R. Co.*, 17 Hun, 115, 22 A. L. J. 433, 11 N. Y. W. D. 71; *Kirkpatrick v. New York Cent. & H. R. R. Co.*, 79 N. Y. 240; *Lake Shore & M. S. R. Co. v. Fitzpatrick*, 31 Ohio St. 479; *Brabbitts v. Chicago & N. W. R. Co.*, 38 Wis. 289; *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477; *Cumberland & P. R. Co. v. State*, 44 Md. 283; *Frandsen v. Chicago, R. I., & P. R. Co.*, 36 Iowa, 372; *Belair v. Chicago & N. W. R. Co.*, 43 Iowa, 662; *Kansas Pacific R. Co. v. Salmon*, 14 Kan. 512, 11 Kan. 83; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Ditherner v. Chicago, M., & St. P. R. Co.*, 47 Wis. 138; *Cottrill v. Chicago, M., & St. P. R. Co.*, 47 Wis. 634; *Kelley v. C., M., & St. P. R. Co.*, 7 Northwest. Rep. 291; *McMillan v. Union Press Brick Works*, 6 Mo. App. 434;

Houston & G. N. R. Co. v. Randall, 50 Tex. 254; *Woodley v. Metropolitan Dist. R. Co.*, L. R. 2 Exch. Div. 384, 388.

² *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 28 Barb. 80; *Warner v. Erie R. Co.*, 39 N. Y. 468, 475; *Steffen v. Chicago & N. W. R. Co.*, 46 Wis. 259; *Beaulieu v. Portland Co.*, 48 Me. 291; *Baulec v. New York & H. R. Co.*, 59 N. Y. 356, 62 Barb. 623.

³ *Columbus, C., & I. C. R. Co. v. Troesch*, 68 Ill. 545, 57 Ill. 155; *Toledo, W., & W. R. Co. v. Moore*, 77 Ill. 217; *Laning v. New York Cent. R. Co.*, 49 N. Y. 521.

⁴ *Mullan v. Phil. & S. M. S. Co.*, 78 Pa. St. 25, 33; *Hass v. Phil. & S. M. S. Co.*, 88 Pa. St. 269; *Holton v. Daly*, 4 Brad. (Ill.) 25.

⁵ *Blake v. Maine Cent. R. Co.*, 70 Me. 60.

CHAPTER XIV.

INJURIES RESULTING IN DEATH.

AT common law, a right of action for a personal injury dies with the person. *Actio personalis moritur cum persona*. The action, if brought by him, abates with his death, and cannot be revived in the name of his personal representative.¹ It is, however, generally provided by statute that the right of action shall survive, that the suit may be commenced or prosecuted by the personal representative, and that the amount recovered shall be a part of the assets of the estate.

No Right of Action where the Injury is instantly Fatal. — If death is simultaneous with the injury, no right of action accrues which can survive. The effect of the statute is to keep alive a cause of action which belonged to the deceased; but, if his death followed instantly the tortious act, there was no time during his life when a cause of action, capable of a survival, accrued. The length of time during which he lived after the injury is not material: it is sufficient if life continued for any period, however brief, after the injury, even without intelligence or consciousness. There may, however, be a spasmodic muscular contraction of the body consistent with the extinction of life.² The same rules of law and evidence apply to an action which survives by statute as if the injured person were alive.³

The Death of a Human Being not a Cause of Action at Common Law. — It is an ancient principle of the common law, that "in a civil court the death of a human being cannot be complained of

¹ Broom's Legal Maxims, pp. 904-909; *Whitford v. Panama R. Co.*, 28 N. Y. 465, 468, 476; *Cregin v. Brooklyn Cross-Town R. Co.*, 75 N. Y. 192.

² *Kearney v. Boston & W. R. Co.*, 9 Cush. 108; *Hollenbeck v. Berkshire R.*

Co., 9 Cush. 478; *Bancroft v. Boston & W. R. Co.*, 11 Allen, 349.

³ *Haring v. New York & E. R. Co.*, 13 Barb. 9; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257.

as an injury," whether it results from the felonious assault or the carelessness of the party causing it. Therefore, in the absence of a special statute provision, an action cannot be maintained for the loss of the comfort, assistance, support, or service of a husband, father, wife, child, or other relative, against a person or corporation by whose negligence or fault the death was caused.¹ The same rule prevails under the Code of Louisiana, although it provides that (article 2294) "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The Court of Cassation, in France, has, however, interpreted the same provision (article 1382) in the Code Napoleon so as to allow a recovery of damages in such cases.²

Statutes providing a Remedy for Relatives in Case of Death.—It is a dictate of justice that persons directly interested in the life of a person wrongfully killed by another should receive from the wrong-doer compensation for the fatal injury. Statutes have therefore been enacted requiring him to compensate those who had an immediate pecuniary interest in the life of the deceased person, such as the widow, husband, parent, children, heirs, or next of kin, for their pecuniary loss, usually with a limitation as to the amount.³ The remedy is, in England and the greater

¹ *Baker v. Bolton*, 1 Camp. 493; *Higgins v. Butcher*, Yelv. 89; *Carey v. Berkshire R. Co.*, 1 Cush. 475; *Kearney v. Boston & W. R. Co.*, 9 Cush. 108; *Lucas v. New York Cent. R. Co.*, 21 Barb. 245; *Whitford v. Panama R. Co.*, 23 N. Y. 465, 477; *Conn. Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265; *State v. Grand Trunk R. Co.*, 58 Me. 176; *Wyatt v. Williams*, 43 N. H. 102; *State v. Manchester & L. R. Co.*, 52 N. H. 528; *Hyatt v. Adams*, 16 Mich. 180; *Long v. Morrison*, 14 Ind. 595; *Worley v. Cincinnati, H., & D. R. Co.*, 1 Handy (Cincinnati), 481; *Campbell v. Rogers*, 2 Handy (Cincinnati), 110; *Eden v. Lexington & F. R. Co.*, 14 B. Monr. 204. The doctrine has been questioned in some cases. *Cutting v. Seabury*, 1 Sprague, 522; *Osborn v. Gillett*, L. R. 8 Exch. 88, 93. See *Ford v. Monroe*, 20 Wend. 210; *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417.

² *Hubgh v. New Orleans & C. R. Co.*, 6 La. An. 495; *Hermann v. New Orleans*

& C. R. Co., 11 La. An. 5; *Earhart v. New Orleans & C. R. Co.*, 17 La. An. 243.

³ The following is the provision of the English "Act (known as Lord Campbell's Act) for compensating the families of persons killed by accidents." (August 26, 1846, 9 & 10 Victoria, c. 93.) "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"That every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought

number of American States, by an action for damages, prosecuted by the executor or administrator, for the benefit of the interested relatives; but in Maine, New Hampshire, and Massachusetts the remedy is by prosecution on behalf of the State, in form criminal, for the recovery of a fine, to be distributed among certain relatives of the deceased. The statutes of the same class, though varying in details, have the same general framework, and most of them have been amended from time to time. Those of New York and Massachusetts are typical of each class.¹ In Maryland, the proceeding, though on behalf of the State, is in form civil.

by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct."

¹ The statute of New York, enacted December 13, 1847, as amended April 7, 1849, and March 16, 1870, provides, besides a criminal process against the person immediately causing the death, —

"§ 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person, and although the death shall have been caused under such circumstances as amount in law to felony.

"§ 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person. And the amount recovered in every such action shall be for the exclusive benefit of the husband or widow and next of kin of such deceased person, and shall be distributed to such husband or widow and next of kin in the proportion now provided by law in relation to the distribu-

tion of personal property of persons dying intestate. And in every such action the jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the husband or widow and next of kin of such deceased person." [Then follows a clause allowing interest from the time of the death, and limiting the action to two years from the death. The "husband" was first inserted by the act of 1870.]

The statute of Massachusetts, first enacted March 23, 1840, and then providing only a remedy for the death of *passengers*, is, as amended, as follows (1874, ch. 372, § 163): —

"If by reason of the negligence or carelessness of a railroad corporation, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of any person being a passenger is lost; or the life of any person being in the exercise of due diligence, and not being a passenger or in the employment of such corporation, is lost, — in either case the corporation shall be punished by a fine not exceeding five thousand nor less than five hundred dollars, to be recovered by indictment and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties, but if there are no children to the use of the widow, or if no widow to the use of the next of kin: *provided*, that the corporation shall not be so liable for the loss of life by any person while walking or being upon its road contrary to law or the reasonable rules and regulations of the corporation. Indictments against a

The statute of New York of 1847, as amended in 1849, was in favor of the widow and next of kin only, and made no provision for the husband in case of the killing of his wife;¹ but he was included by the later statute of 1870.² The English act, as well as that of Pennsylvania, is for the benefit of the immediate family, the husband and wife, parents and children, to the exclusion of the next of kin.³ The act of Wisconsin is in favor of the surviving husband or widow; and, if there be none, the amount goes to the lineal descendants of the deceased, or, in default of such, to his lineal ancestors.⁴ A statute, like that of New York, which gives a right of action for the benefit of "the widow and next of kin," is construed to give the right when there are next of kin but no widow surviving.⁵ The terms "next of kin" are used in the statute in their technical sense, and include all who come within the legal description. Their right to its remedy depends on their belonging to the class, and not upon their right to the service of the deceased or their dependence on him for support. The action for their benefit may be maintained wherever the deceased—as, for instance, an infant—could, if he had survived, maintain an action.⁶ The statute contemplates but one suit for the benefit of all the parties entitled to the compensation.⁷

The Massachusetts statute applies where the injury was done outside of the company's location, upon a private track used by it with the land-owner's consent.⁸ It did not at one time include

corporation for loss of life shall be prosecuted within one year from the injury causing the death."

A clause in the statute of Wisconsin, excluding the jurisdiction of the national courts in cases arising under it, was held unconstitutional in *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270.

¹ *Lucas v. New York Cent. R. Co.*, 21 Barb. 245; *Green v. Hudson River R. Co.*, 2 Abbott Ct. App. 277, 28 Barb. 9, 32 Barb. 25; *Dickens v. New York Cent. R. Co.*, 23 N. Y. 158. See *Worley v. Cincinnati, H., & D. R. Co.*, 1 Handy (Cincinnati), 481.

² Statutes at Large, 1870, ch. 78, § 2.

³ *Penn. R. Co. v. Keller*, 67 Pa. St. 800.

⁴ *Woodward v. Chicago & N. W. R. Co.*, 23 Wis. 400.

⁵ *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310, 3 E. D. Smith, 103; *Quin v. Moore*, 15 N. Y. 432; *Dickens v. New*

York Cent. R. Co., 23 N. Y. 158, 28 Barb. 41; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471; *Green v. Hudson River R. Co.*, 2 Abbott Ct. App. 277, 28 Barb. 9, 32 Barb. 25; *Chicago v. Major*, 18 Ill. 349; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400; *Johnston v. Cleveland & T. R. Co.*, 7 Ohio St. 336; *Kansas Pacific R. Co. v. Miller*, 2 Col. 442.

⁶ *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310, 3 E. D. Smith, 103; *Quin v. Moore*, 15 N. Y. 432; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90, 1 Biss. 412, 453. See *Grottenkemper v. Harris*, 25 Ohio St. 510; *Dunhene v. Ohio Life Ins. & T. Co.*, 1 Disney, 257.

⁷ *Houston & T. C. R. Co. v. Moore*, 49 Tex. 31; *Galveston, H., & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.

⁸ *Commonwealth v. Boston & L. R. Co.*, 126 Mass. 61.

within the class of persons for whose death provision is made a person not a passenger who leaves no widow or children.¹

The Statutes limited to Injuries within the State.— These statutes have no extra-territorial effect, but are limited to injuries committed within the State; and although the corporation which inflicted the injury was created by the State in which there is a statute of this kind, it is not liable in the courts of such State for an injury committed abroad.² Nor does the fact that the injured person died within the jurisdiction of the State bring within the statute injuries which were inflicted beyond the State.³ Generally the statute does not apply to injuries committed on the high seas;⁴ but it has been held to extend to such injuries when committed within waters which, though arms of the sea, are within the jurisdiction of the State;⁵ or when committed, even beyond its jurisdiction, on a vessel belonging to the State, and suffered by one of its citizens.⁶

The statute can be enforced only within the State which enacted it; and an administrator cannot, in case of an injury within the State, maintain an action under the statute in another State, although appointed in the latter State.⁷ It has been held that, if the statutes of two States are similar, a recovery can be had for an injury in one State within the jurisdiction of the other.⁸

The statute is for the benefit of persons who are not citizens of

¹ *Commonwealth v. Boston & A. R. Co.*, 121 Mass. 36.

² *Whitford v. Panama R. Co.*, 23 N.Y. 465, 3 Bosw. 67; *Mahler v. Norwich & N. Y. T. Co.*, 35 N. Y. 352, 45 Barb. 226; *McDonald v. Mallory*, 77 N. Y. 546, 550; *Vandeventer v. New York & N. H. R. Co.*, 27 Barb. 244; *Crowley v. Panama R. Co.*, 30 Barb. 99; *Beach v. Bay State Steamboat Co.*, 30 Barb. 433, 10 Abbott Pr. 71 (overruling 27 Barb. 248, 16 How. Pr. 1); *Hover v. Penn. Co.*, 25 Ohio St. 667; *Campbell v. Rogers*, 2 Handy (Cincinnati), 110; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

³ *McCarthy v. Chicago, R. I., & P. R. Co.*, 18 Kan. 46; *Crowley v. Panama R. Co.*, 30 Barb. 99.

⁴ *Armstrong v. Beadle* (U. S. C. C. D. Cal.), 8 Reporter, 36.

⁵ *Mahler v. Norwich & N. Y. T. Co.*, 35 N. Y. 352, 45 Barb. 226.

⁶ *McDonald v. Mallory*, 77 N. Y. 546, 44 N. Y. Superior, 80.

⁷ *Richardson v. New York Cent. R. Co.*, 98 Mass. 85; *Woodard v. Mich. S. & N. I. R. Co.*, 10 Ohio St. 121; *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177; *Mackay v. Central R. Co.* (U. S. C. C., S. D. N. Y.), 4 Fed. Rep. 617. But see *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Nashville & C. R. Co. v. Sprayberry*, 9 Heisk. 852, 8 Baxter, 341; *Hobbs v. Memphis & C. R. Co.*, 9 Heisk. 873.

⁸ *Stallknecht v. Penn. R. Co.*, 13 Hun, 451; *Nashville & C. R. Co. v. Eakin*, 6 Cold. 582; *Selma, R., & D. R. Co. v. Lacy*, 43 Ga. 461, 49 Ga. 106; *Western & A. R. Co. v. Strong*, 52 Ga. 461. See *McDonald v. Mallory*, 77 N. Y. 546, 550.

the State as well as for its own citizens, where the killing was within the State; and a foreign administrator has been allowed to prosecute a suit under it.¹

Construction of Statutes and Election of Remedies. — Where the civil action to which at common law the deceased was entitled is kept alive by a statute, the question arises, whether another statute providing a remedy by indictment applies only where the deceased had no right of action, that is, when the death was instantaneous. It is held in Maine that the proceeding by indictment holds only where the death was instantaneous. The view is taken that one remedy ends where the other begins, in order to prevent the application of two independent and conflicting remedies to the same injury.² But in Massachusetts the remedy by indictment is held to apply to an injury resulting in death, whether the death is immediate or not, although when it is not immediate a civil action might be brought by the personal representative.³ The statute of New York is held to apply whether the death is instantaneous or consequential.⁴

Where death is not immediate, some statutes are construed to allow an election of remedies, — one by an action at common law accruing to the injured person for pain and suffering and surviving under the statute, and the other an action for the benefit of relatives who suffer pecuniarily from his death; but they treat the injury as one not admitting of severance, and a judgment in one action is a bar to the other.⁵ Other statutes, however, allow two concurrent remedies, — one for the intestate's cause of action,

¹ *Jeffersonville, M., & I. R. Co. v. Hendricks*, 41 Ind. 48; *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 213. Letters of administration in the case of a person not an inhabitant of the State, who was killed by a railroad company, and who left no assets within it, was refused in *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477. The foreign administrator was held entitled, as a matter of right, to an ancillary administration for the purpose of prosecuting the suit, in *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 213. See *Conner v. Paul*, 12 Bush, 144.

² *State v. Maine Cent. R. Co.*, 60 Me. 490; *State v. Grand Trunk R. Co.*, 61 Me. 114.

³ *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236. The effect of a judgment in a civil action, or a settlement with the party injured or his representatives, was reserved.

⁴ *Brown v. Buffalo & S. L. R. Co.*, 22 N. Y. 191; *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. 829.

⁵ *Hansford v. Payne*, 11 Bush, 380; *Conner v. Paul*, 12 Bush, 144. See *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417; *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236; *Walters v. Chicago, R. I., & P. R. Co.*, 36 Iowa, 458, 41 Iowa, 71.

with damages limited to the time of his death; and the other for the pecuniary injury resulting to the survivors who are entitled to the amount recovered under the statute.¹

Notwithstanding the remedy by statute, an action at common law for expenses of sickness and funeral, and loss of service and capacity for labor during the period between the injury and the death, has been sustained;² but an action at common law for loss of service or society cannot, as already stated, be maintained where the death immediately follows the injury.³

The same rules of law and evidence apply to the trial of an indictment or of a civil action for the benefit of relatives as to the trial of a civil action for damages brought by the injured person.⁴ Thus, the same rules apply to determine the relative rights and duties of the company and of a passenger for whose death compensation is sought,⁵ or the negligence which makes the company liable, or the contributory negligence which defeats the injured person's right of action,⁶ or the exemption from liability which results from the lawful transfer of the road into the exclusive possession of other parties,⁷ or the liability to a servant for inju-

¹ *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

² *Barley v. Chicago & A. R. Co.*, 4 Biss. 430; *Hyatt v. Adams*, 16 Mich. 180; *Long v. Morrison*, 14 Ind. 595; *Eden v. Lexington & F. R. Co.*, 14 B. Monr. 204; *Pack v. New York*, 3 N. Y. 489; *Whitford v. Panama R. Co.*, 23 N. Y. 465, 479, 480; *Potter v. Metropolitan Dist. R. Co.*, 30 Law Times, n. s. 765; *Bradshaw v. Lancashire & Y. R. Co.*, L. R. 10 C. P. 189. See *Walters v. Chicago, R. I., & P. R. Co.*, 36 Iowa, 458, 41 Iowa, 71. The husband's right of action for loss of service and expenses paid in consequence of injury to the wife abates with his death, but may be kept alive by statute. *Creggin v. Brooklyn Cross-Town R. Co.*, 75 N. Y. 192, 18 Hun, 368, 19 Hun, 341.

³ *Green v. Hudson River R. Co.*, 2 Abbott Ct. App. 277, 28 Barb. 9. See *McGovern v. New York Cent. & H. R. R. Co.*, 67 N. Y. 417.

⁴ *State v. Maine Cent. R. Co.*, 60 Me. 490; *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236; *Commonwealth v. Boston & W. R. Co.*, 101 Mass. 201; *Commonwealth v. Vt. & M. R. Co.*, 108 Mass. 7.

⁵ *State v. Grand Trunk R. Co.*, 58 Me. 176.

⁶ *State v. Manchester & L. R. Co.*, 52 N. H. 528; *Blaker v. New Jersey Midland R. Co.*, 3 Stewart (N. J.), 240; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366; *Evansville & C. R. Co. v. Lowdermilk*, 15 Ind. 120; *Lofton v. Vogles*, 17 Ind. 105; *Hendricks v. Western & A. R. Co.*, 52 Ga. 467; *Rowland v. Cannon*, 35 Ga. 105; *Atlanta & R. A. L. R. Co. v. Ayres*, 53 Ga. 12; *State v. Balt. & O. R. Co.*, 24 Md. 84; *Baltimore & O. R. Co. v. Fryer*, 30 Md. 47; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Cumberland & P. R. Co. v. State*, 37 Md. 156; *Elliott v. St. Louis & I. M. R. Co.*, 67 Mo. 272; *Baltimore & O. R. Co. v. Sherman*, 30 Gratt. 602; *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 805; *Richmond & D. R. Co. v. Anderson*, 31 Gratt. 812; *Darling v. Williams*, 35 Ohio St. 58; *Willets v. Buffalo & R. R. Co.*, 14 Barb. 585. See *Louisville & N. R. Co. v. Connor*, 9 Heisk. 19, 2 Baxter, 382.

⁷ *State v. Consolidated European & N. A. R. Co.*, 67 Me. 479; *Norton v. Wiswall*, 26 Barb. 618; *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90.

ries caused by the negligence of his fellow-servants,¹ or by defective machinery.²

Some authorities treat the statute as merely keeping alive a right of action,³ while others treat it as giving a new cause of action.⁴ But whether the statute gives a new cause of action or not, it should be interpreted as intended to give one only when the company would be liable at common law in the event of an injury not fatal in its results.

The statute usually applies not only to corporations which work their railroads, but also to other parties who are lawfully working them by lease or otherwise;⁵ but it does not apply to individual stockholders.⁶

An action cannot be maintained under the statute for an injury for which the deceased received satisfaction in his lifetime. It is not to be presumed that the statute contemplated a double payment and satisfaction.⁷

Averments in Pleading.—The existence of persons entitled to the amount recovered is essential to a recovery, and must be proved and alleged in the declaration or indictment.⁸ Some

¹ *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112 (overruling *Schultz v. Pacific R. Co.*, 36 Mo. 13); *State v. Maine Cent. R. Co.*, 60 Me. 490; *Madison & I. R. Co. v. Bacon*, 6 Ind. 205; *Sherman v. Rochester & S. R. Co.*, 15 Barb. 574; *Hutchinson v. York, N., & B. R. Co.*, 5 Exch. 343; *Wigmore v. Jay*, 5 Exch. 354; *Paterson v. Wallace*, 1 Macq. 748. See *Baltimore & O. R. Co. v. State*, 33 Md. 542.

² *Elliott v. St. Louis & I. M. R. Co.*, 67 Mo. 272; *McMillan v. Saratoga & W. R. Co.*, 20 Barb. 449; *Brydon v. Stewart*, 2 Macq. 30.

³ *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112, 120, 124; *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. 829; *Earhart v. New Orleans & C. R. Co.*, 17 La. An. 243; *Sherman v. Western Stage Co.*, 24 Iowa, 515, 543; *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555.

⁴ *Whitford v. Panama R. Co.*, 23 N.Y. 465, 470; *Crowley v. Panama R. Co.*, 30 Barb. 99; *Chicago v. Major*, 18 Ill. 349; *Richardson v. New York Cent. R. Co.*, 98 Mass. 85.

⁵ *Lamphear v. Buckingham*, 33 Conn.

237; *Meara v. Holbrook*, 20 Ohio St. 137. See *Commonwealth v. Boston & W. R. Co.*, 11 Cush. 512.

⁶ *State v. Gilmore*, 24 N. H. 461.

⁷ *Dibble v. New York & E. R. Co.*, 25 Barb. 183; *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555; *Fowlkes v. Nashville & D. R. Co.*, 5 Baxter (Tenn.), 663. See *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236, 237, 238.

⁸ *Safford v. Drew*, 3 Duer, 627; *Lucas v. New York Cent. R. Co.*, 21 Barb. 245; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400; *Woodward v. Chicago & N. W. R. Co.*, 23 Wis. 400; *State v. Gilmore*, 24 N. H. 461; *Commonwealth v. Eastern R. Co.*, 5 Gray, 473; *Commonwealth v. Boston & A. R. Co.*, 121 Mass. 36; *State v. Consolidated European & N. A. R. Co.*, 67 Me. 479, 482; *Johnston v. Cleveland & T. R. Co.*, 7 Ohio St. 336, 339. *Contra*, *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431; *Matthews v. Warner*, 29 Gratt. 570; *Baltimore & O. R. Co. v. Sherman*, 30 Gratt. 602. See *Lamphear v. Buckingham*, 33 Conn. 237.

authorities require it to state the names of such persons,¹ but others dispense with them.²

The indictment or declaration must aver the negligence or default of the company; but it need not describe the kind of negligence or particular acts which constitute the default, or the names or positions of the servants by whose fault the injury was inflicted.³ It need not allege the exercise of due care by the injured party, or that his negligence did not contribute to the injury.⁴ It should allege that an administrator has been duly qualified, where one is required as the recipient of the fund.⁵

Damages. — The measure of damages in an action under the statute is the pecuniary injury suffered by the person or persons entitled to the amount recovered. "The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give a verdict."⁶ The cause of action is distinct from the one which the injured person, if surviving, would have had, and is based on a different principle; to wit, the reasonable probability of a pecuniary benefit, from the continuance of the life of the deceased to the persons described in the act.⁷ The express reference to "the pecuniary injury" contained in the statute of New York, and in those of other States which have followed its terms, assumes such injury to the survivors to be the basis of the action.⁸ Compensation for a pecuniary injury being

¹ *Baltimore & O. R. Co. v. Gettle*, 3 W. Va. 376.

² *Jeffersonville, M., & I. R. Co. v. Hendricks*, 41 Ind. 48, 76. See *Commonwealth v. Boston & W. R. Co.*, 11 Cush. 512.

³ *Commonwealth v. Boston & W. R. Co.*, 11 Cush. 512; *State v. Manchester & L. R. Co.*, 52 N. H. 528; *Indianapolis, P., & C. R. Co. v. Keely*, 23 Ind. 133; *Louisville, C., & L. R. Co. v. Case*, 9 Bush, 728. See *Cincinnati, H., & D. R. Co. v. Chester*, 57 Ind. 297; *Claxton v. Lexington & B. S. R. Co.*, 13 Bush, 636.

⁴ *State v. Manchester & L. R. Co.*, 52 N. H. 528; *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. 805. But see *Indianapolis, P., & C. R. Co. v. Keely*, 23 Ind. 133; *Jeffersonville, M., & I. R. Co. v. Hendricks*, 41 Ind. 48. As to the prac-

tice where a demurrer is overruled, see *Daily v. New York & N. H. R. Co.*, 32 Conn. 356; *Carey v. Day*, 36 Conn. 152.

⁵ *Commonwealth v. Sanford*, 12 Gray, 174; *Commonwealth v. East Boston Ferry Co.*, 13 Allen, 589. Various points of pleading are considered in *State v. Manchester & L. R.*, 52 N. H. 528; *Commonwealth v. Fitchburg R. Co.*, 120 Mass. 372, 126 Mass. 472.

⁶ *Quin v. Moore*, 15 N. Y. 432, 435; *Telfer v. Northern R. Co.*, 1 Vroom, 188.

⁷ *Pym v. Great Northern R. Co.*, 4 Best & S. 396; *Paulmier v. Erie R. Co.*, 5 Vroom, 151; *Kesler v. Smith*, 66 N. C. 154; *Burton v. Wil. & W. R. Co.*, 82 N. C. 504; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

⁸ The English act also in its terms contemplates an award of damages "pro-

the measure of damages, the jury are to exclude from consideration (1) the personal wrong inflicted on the deceased, and his suffering and pain; (2) the wounded feelings of the survivors for whose benefit the action is brought, and their grief and loss of society; (3) exemplary or punitive damages for any matters of aggravation, even in jurisdictions where such damages are allowed in actions at common law for personal injuries. The rule of damages, as here stated, is declared in numerous decisions.¹ Under

portioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action shall be brought." The difficulty of fixing upon any satisfactory standard in the assessment of the damages is treated in *The Jurist*, vol. xviii. part 2, p. 1.

¹ *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310, 3 E. D. Smith, 103; *Quin v. Moore*, 15 N. Y. 432; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, 29 N. Y. 252; *Green v. Hudson River R. Co.*, 2 Abbott Ct. App. 277, 28 Barb. 9, 32 Barb. 25; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, 47 Barb. 515; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Chicago v. Major*, 18 Ill. 349; *Chicago & R. I. R. Co. v. Morris*, 26 Ill. 400; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Conant v. Griffin*, 48 Ill. 410; *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25; *Chicago, B., & Q. R. Co. v. Harwood*, 80 Ill. 88; *Lake Shore & M. S. R. Co. v. Sunderland*, 2 Brad. (Ill.) 307; *Illinois Cent. R. Co. v. Barron*, 5 Wall. 90, 1 Biss. 412, 453; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270; *Barley v. Chicago & A. R. Co.*, 4 Biss. 430; *Penn. R. Co. v. Zebe*, 33 Pa. St. 318 (qualifying *Penn. R. Co. v. McCloskey*, 23 Pa. St. 526); *Penn. R. Co. v. Ogier*, 35 Pa. St. 60; *Penn. R. Co. v. Vandever*, 36 Pa. St. 298; *North Penn. R. Co. v. Robinson*, 44 Pa. St. 175; *Penn. R. Co. v. Henderson*, 51 Pa. St. 315; *Catawissa R. Co. v. Armstrong*, 52 Pa. St. 282; *Penn. R. Co. v. Butler*, 57 Pa. St. 335; *Penn. R. Co. v. Goodman*, 62 Pa. St. 329; *Penn. R. Co. v. Keller*, 67 Pa. St. 300; *Huntingdon & B. T. R. Co. v. Decker*, 84 Pa. St. 419, 82 Pa. St. 119; *Mansfield Coal & C. Co. v. McEnery*, 37

Leg. Int. 28; *Coakley v. North Penn. R. Co.*, 6 Am. Law Reg. 355; *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372, 22 Wis. 615; *Castello v. Landwehr*, 28 Wis. 522; *State v. Balt. & O. R. Co.*, 24 Md. 84; *Telfer v. Northern R. Co.*, 1 Vroom, 188; *Paulmier v. Erie R. Co.*, 5 Vroom, 151; *South Western R. Co. v. Paulk*, 24 Ga. 356; *Donaldson v. Miss. & M. R. Co.*, 18 Iowa, 230; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366; *Jeffersonville R. Co. v. Swayne*, 26 Ind. 477 (reviewing *Long v. Morrison*, 14 Ind. 595, and *Indianapolis, P., & C. R. Co. v. Keeley*, 23 Ind. 133); *Kesler v. Smith*, 66 N. C. 154; *Hyatt v. Adams*, 16 Mich. 180; *Groff v. Cincinnati & I. R. Co.*, 1 Cincinnati Superior Ct. 264; *Kansas Pacific R. Co. v. Cutter*, 19 Kan. 83; *Kansas Pacific R. Co. v. Miller*, 2 Col. 442; *Little Rock & F. S. R. Co. v. Barker*, 33 Ark. 350; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431; *Covington St. R. Co. v. Packer*, 9 Bush, 455; *Blake v. Midland R. Co.*, 18 Q. B. 93; *Franklin v. South Eastern R. Co.*, 3 Hurl. & N. 211; *Dalton v. South Eastern R. Co.*, 4 C. B. n. s. 296; *Pym v. Great Northern R. Co.*, 4 Best & S. 396. Exemplary damages are allowed in Kentucky: *Bowler v. Lane*, 3 Met. 311; *Louisville, C., & L. R. Co. v. Mahony*, 7 Bush, 235; *Louisville, C., & L. R. Co. v. Case*, 9 Bush, 728; in Alabama: *Savannah & M. R. Co. v. Shearer*, 57 Ala. 672; *South & N. A. R. Co. v. Sullivan*, 59 Ala. 272; in Virginia: *Matthews v. Warner*, 29 Gratt. 570; *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394; and in Colorado: *Kansas Pacific R. Co. v. Miller*, 2 Col. 442; *Kansas Pacific R. Co. v. Lundin*, 3 Col. 94; and by statute in California: *Taylor v. Western Pacific R. Co.*, 45 Cal. 323; and by the Constitution in Texas: *Galveston, H., & S. A. R. Co.*

the statute of Connecticut, the ground of damages is held to be the injury to the deceased, and not the loss to the relatives.¹ This statute does not include terms equivalent to those in which the English and New York statutes refer to the pecuniary injury of the survivors. So, also, the statute of Massachusetts, which provides a prosecution by indictment, is held to allow a greater or less penalty within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendant, but not according to the loss sustained by the widow and heirs of the deceased.² Its purpose is considered to be not only to provide compensation to the relatives, but to inflict punishment for the offence.³

Nominal damages may be given without proof of actual pecuniary loss.⁴ Proof of such loss has been required to sustain a verdict for more than nominal damages;⁵ but the jury may infer such loss from the age, character, and capacity of the deceased and his relation to the survivors to whose benefit the amount recovered is to inure, and give substantial damages without further direct proof of special loss.⁶

The difficulty of stating a fixed and definite rule for measuring the compensation allowed under the statute has been frequently confessed. The jury is to exercise a sound judgment, while the court retains its corrective function in revising verdicts which award excessive damages.⁷ The court should caution the jury

v. Le Gierse, 51 Tex. 189; *Southern Cotton Press Co. v. Bradley*, 52 Tex. 587. See *Sherman v. Western Stage Co.*, 24 Iowa, 515; *Penn. R. Co. v. Zebe*, 33 Pa. St. 318, 330; *Kansas Pacific R. Co. v. Cutter*, 19 Kan. 83. In Tennessee, the damages may include the suffering, loss of time, and expenses of the deceased resulting from the injury. *Nashville & C. R. Co. v. Prince*, 2 Heisk. 580, 585; *Nashville & C. R. Co. v. Smith*, 6 Heisk. 174; *Nashville & C. R. Co. v. Stevens*, 9 Heisk. 12; *Collins v. East Tenn., V., & G. R. Co.*, 9 Heisk. 841; *Fowlkes v. Nashville & D. R. Co.*, 5 Baxter, 663.

¹ *Goodsell v. Hartford & N. H. R. Co.*, 33 Conn. 51; *Louisville & N. R. Co. v. Burke*, 6 Col. 45.

² *Carey v. Berkshire R. Co.*, 1 Cush. 475.

³ *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236.

⁴ *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310, 317; *Quin v. Moore*, 15 N. Y. 432; *Keller v. New York Cent. R. Co.*, 2 Abbott Ct. App. 480, 17 How. Pr. 102.

⁵ *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338; *Illinois Cent. R. Co. v. Weldon*, 52 Ill. 290; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Mitchell v. New York Cent. & H. R. R. Co.*, 2 Hun, 535.

⁶ *O'Mara v. Hudson River R. Co.*, 38 N. Y. 445; *Ihl v. Forty-Second St. R. Co.*, 47 N. Y. 317; *Dickens v. New York Cent. R. Co.*, 1 Abbott Ct. App. 505; *Cornwall v. Mills*, 44 N. Y. Superior Ct. 45; *Chicago v. Scholten*, 75 Ill. 468; *Rockford, R. I., & St. L. R. Co. v. Delaney*, 82 Ill. 198; *Grotenkemper v. Harris*, 25 Ohio St. 510.

⁷ *Penn. R. Co. v. Zebe*, 33 Pa. St. 318; *Penn. R. Co. v. Ogier*, 35 Pa. St. 60; *Catawissa R. Co. v. Armstrong*, 52 Pa. St. 282; *Penn. R. Co. v. Keller*, 67 Pa. St. 300; *Paulmier v. Erie R. Co.*, 5 Vroom,

not to assume an unlimited discretion, and instruct it to limit the verdict to a just compensation for the pecuniary injury.¹ The court will set aside a verdict which gives excessive damages, or damages which are beyond just compensation for the pecuniary injury and are awarded by way of example or punishment.²

The amount received by the relatives, for whose benefit the action is brought, upon policies of insurance on the life of the deceased is not to be admitted in reduction of damages.³

The circumstances of the deceased; his occupation, age, health, habits of industry, sobriety, and economy; his skill and capacity for business; the amount of his property, and even his annual earnings and the probable duration of his life, — have been admitted to show the pecuniary injury which the survivors have suffered; and ordinarily such proof is required to entitle them to substantial damages.⁴ Proof has been admitted of a father's occupation

151; Illinois Cent. R. Co. v. Barron, 5 Wall. 90, 1 Biss. 412, 453; Barley v. Chicago & A. R. Co., 4 Biss. 430; South Western R. Co. v. Paulk, 24 Ga. 356; Chicago & A. R. Co. v. Shannon, 43 Ill. 338; Kansas Pacific R. Co. v. Cutter, 19 Kan. 83; Hermann v. New Orleans & C. R. Co., 11 La. An. 5; Frank v. New Orleans & C. R. Co., 20 La. An. 25; Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205; Tilley v. Hudson River R. Co., 29 N. Y. 252, 286; McIntyre v. New York Cent. R. Co., 37 N. Y. 287, 47 Barb. 515; Ewen v. Chicago & N. R. Co., 38 Wis. 613; Burton v. Wil. & W. R. Co., 82 N. C. 504; Kansas Pacific R. Co. v. Miller, 2 Col. 442.

¹ Green v. Hudson River R. Co., 32 Barb. 25, 2 Abbott Ct. App. 277; State v. Balt. & O. R. Co., 24 Md. 84; Penn. R. Co. v. Zebe, 33 Pa. St. 318; Penn. R. Co. v. Ogier, 35 Pa. St. 60; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Penn. R. Co. v. Butler, 57 Pa. St. 335; Penn. R. Co. v. Keller, 67 Pa. St. 300; Louisville & N. R. Co. v. Burke, 6 Cold. 46; Chicago v. Scholten, 75 Ill. 468; Burton v. Wil. & W. R. Co., 82 N. C. 504.

² Sherman v. Western Stage Co., 24 Iowa, 515; Rose v. Des Moines Valley R. Co., 39 Iowa, 246; Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Chicago & A. R. Co. v. Garvey, 58 Ill. 83; Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426; Lake Shore & M. S. R. Co. v. Sunderland, 2

Brad. (Ill.) 307; Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205; Potter v. Chicago & N. W. R. Co., 22 Wis. 615; McIntyre v. New York Cent. R. Co., 47 Barb. 515, 37 N. Y. 287; Telfer v. Northern R. Co., 1 Vroom, 188; Paulmier v. Erie R. Co., 5 Vroom, 151; Groff v. Cincinnati & I. R. Co., 1 Cincinnati (Superior Ct.), 264; Nashville & C. R. Co. v. Prince, 2 Heisk. 580; Nashville & C. R. Co. v. Stevens, 9 Heisk. 12; Nashville & D. R. Co. v. Jones, 9 Heisk. 27.

³ Althorf v. Wolfe, 22 N. Y. 355; Kellogg v. New York Cent. & H. R. R. Co., 79 N. Y. 72; Baltimore & O. R. Co. v. Wightman, 29 Gratt. 431; Harding v. Townsend, 43 Vt. 536; Pittsburg, C., & St. L. R. Co. v. Thompson, 56 Ill. 138; Bradburn v. Great Western R. Co., L. R. 10 Exch. 1. An insurance company, which has paid the amount of a policy on the life of a person killed by the wrongful act of another, cannot recover it of the wrongdoer. Conn. Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265.

⁴ Telfer v. Northern R. Co., 1 Vroom, 188; Baltimore & O. R. Co. v. State, 24 Md. 271; Tilley v. Hudson River R. Co., 24 N. Y. 471, 29 N. Y. 252; McIntyre v. New York Cent. R. Co., 37 N. Y. 287; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Penn. R. Co. v. Butler, 57 Pa. St. 335; Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Donaldson v. Miss. & M. R. Co., 18 Iowa, 280; South Western R. Co. v.

with reference to its probable effect in determining the business and earnings of a child for whose death the action was brought.¹ The chances of the deceased in acquiring property, wealth, or fortune by a change of circumstances are too uncertain to be considered by the jury.²

The defendant's pecuniary condition cannot be considered in the assessment of damages;³ nor can the number of the plaintiff's children.⁴ The right of a widow to compensation for the killing of her husband does not, under the statute, depend upon her having been dependent on him for support during his lifetime.⁵ The poverty or wealth of the next of kin,⁶ or the fact that the next of kin became heirs to the property of the deceased,⁷ is not to be considered in determining the amount of damages.

The damages include the prospective as well as past pecuniary injury,⁸ and expenses of medical attendance and funeral.⁹

Damages for a Husband's and Father's Death.—Where the action is for the benefit of the widow and children, the jury, rejecting *solatium* for distress of mind, are to consider only their pecuniary loss,—that is, “what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for their benefit, taking into consideration his age, ability, and dis-

Paulk, 24 Ga. 356; *Yonge v. Kinney*, 28 Ga. 111; *Macon & W. R. Co. v. Johnson*, 38 Ga. 409; *David v. South Western R. Co.*, 41 Ga. 223; *Atlanta & R. A. L. R. Co. v. Ayers*, 53 Ga. 12; *Kesler v. Smith*, 66 N. C. 154; *Burton v. Wil. & W. R. Co.*, 82 N. C. 504; *Taylor v. Western Pacific R. Co.*, 45 Cal. 323; *Kansas Pacific R. Co. v. Cutter*, 19 Kan. 83; *Kansas Pacific R. Co. v. Lundin*, 3 Col. 94; *Denver, S. P., & P. R. Co. v. Woodward*, 4 Col. 1, 162; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 481; *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394; *Nashville & C. R. Co. v. Prince*, 2 Heisk. 580; *Chicago v. Scholten*, 75 Ill. 468; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302.

¹ *Walters v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 71, 36 Iowa, 458.

² *Mansfield Coal & C. Co. v. McEnery*, 37 Leg. Int. 28.

³ *Conant v. Griffin*, 48 Ill. 411; *Chicago & N. W. R. Co. v. Bayfield*, 37 Mich. 205. But *contra*, *Louisville, C., & L. R. Co. v. Mahony*, 7 Bush, 235.

⁴ *Kesler v. Smith*, 66 N. C. 154.

⁵ *Denver, S. P., & P. R. Co. v. Woodward*, 4 Col. 1, 162.

⁶ *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Chicago & N. W. R. Co. v. Howard*, 6 Brad. (Ill.) 569; *Central R. Co. v. Moore*, 61 Ga. 151. See *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372, 22 Wis. 615; *Barley v. Chicago & A. R. Co.*, 4 Biss. 430.

⁷ *Terry v. Jewett*, 78 N. Y. 338.

⁸ *Oldfield v. New York & H. R. Co.*, 14 N. Y. 310, 318; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Baltimore & O. R. Co. v. State*, 41 Md. 268.

⁹ *Cleveland & P. R. Co. v. Rowan*, 66 Pa. St. 393; *Covington St. R. Co. v. Packer*, 9 Bush, 455.

position to labor, and his habits of living and expenditure.”¹ The loss of a father’s superintendence, attention to and care of his family, and the education of his children are to be considered as an element of damages in an action for the benefit of children.²

Damages for a Mother’s Death.—In an action for a mother’s death, brought for the benefit of minor children, the loss of maternal nurture and instruction, moral and physical, to the extent they naturally affect the pecuniary interests of the children, may be considered in the assessment of the damages, without limiting them to the period of minority; but her future earnings, which belong by law to her husband, and the probable increase of the father’s estate by reason thereof, have been excluded.³ Her capacity for such nurture and instruction, in order to be an element in the amount of damages, should be shown by proof.⁴

Damages for a Child’s Death.—A parent may recover, under the statute, the value of the services of his minor child, and also expenses of medical attendance, nursing, and burial.⁵ The damages are to be limited to the value of the child’s services during minority, unless there is proof of facts showing a reasonable expectation of pecuniary benefit after the period of minority.⁶ It is competent to prove such facts in the condition of the parent as will show his probable need of the child’s services.⁷ The death of children of tender years, who are able to render only trifling household services, has sometimes been held to involve no pecuniary injury to parents.⁸

¹ Penn. R. Co. v. Butler, 57 Pa. St. 335, 338; Mansfield Coal & C. Co. v. McEnery, 37 Leg. Int. 28; Illinois Cent. R. Co. v. Baches, 55 Ill. 379.

² Baltimore & O. R. Co. v. Wightman, 29 Gratt. 431, 443.

³ Tilley v. Hudson River R. Co., 24 N. Y. 471, 29 N. Y. 252; McIntyre v. New York Cent. R. Co., 37 N. Y. 287, 47 Barb. 515; Illinois Cent. R. Co. v. Weldon, 52 Ill. 290.

⁴ Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Chicago, R. I., & P. R. Co. v. Austin, 69 Ill. 426.

⁵ O’Mara v. Hudson River R. Co., 38 N. Y. 445; McMahon v. New York, 33 N. Y. 642; McGovern v. New York Cent. & H. R. R. Co., 67 N. Y. 417; Ewen v.

Chicago & N. W. R. Co., 38 Wis. 613; Ohio & M. R. Co. v. Tindall, 13 Ind. 366; Covington St. R. Co. v. Packer, 9 Bush, 455; Little Rock & F. S. R. Co. v. Barker, 33 Ark. 350.

⁶ Penn. R. Co. v. Zebe, 33 Pa. St. 318; Telfer v. Northern R. Co., 1 Vroom, 188; Potter v. Chicago & N. W. R. Co., 21 Wis. 372, 22 Wis. 615; Rockford, R. I., & St. L. R. Co. v. Delaney, 82 Ill. 198. See Walters v. C., R. I., & P. R. Co., 41 Iowa, 71; Baltimore & O. R. Co. v. Noell, 32 Gratt. 394; Houston & T. C. R. Co. v. Nixon, 52 Tex. 19.

⁷ Ewen v. Chicago & N. R. Co., 38 Wis. 613.

⁸ Holleran v. Bagnell, 6 L. R. Ir. 333.

In estimating the value of a minor daughter's services, the chances of marriage between eighteen and twenty-one are not to be taken into account by way of diminishing their value.¹

Where a recovery is sought for the death of an adult child, there must be evidence of a relation giving rise to a reasonable expectation of pecuniary benefit. Thus, where an action is brought by parents on account of the death of an adult son, it must be proved, in order to recover substantial damages, that the family relation continued in fact; and this may be shown by his continuing to live with them, or by his aiding in their support, or even, in the absence of actual aid, by his assurances of such aid.² Some authorities limit the compensation for a child's death strictly to the period of minority.³ The widowed mother is entitled to the benefit of the statute in case of the killing of her son, although not at common law bound for his support or entitled to his services.⁴

Damages to Relatives not of the Immediate Family. — The reasonable probability that the surviving relatives would have received support or pecuniary benefit from the deceased, if he had lived, is the controlling element in determining the amount of the damages.⁵ Where the next of kin are collaterals, whom the deceased was not by law bound to support, it is proper to show, in measuring their loss, that they had been in fact supported by him.⁶

Evidence. — The relation of husband and wife is to be proved under the statute as in civil causes.⁷

In assessing the damages, the reasonable probability of the length of life of the deceased may be considered;⁸ and, in determining such probable duration, life-tables are competent evidence.⁹

¹ *Seaman v. Farmers' Loan & T. Co.*, 15 Wis. 578.

² *Penn. R. Co. v. Adams*, 55 Pa. St. 499; *Penn. R. Co. v. Keller*, 67 Pa. St. 300; *Groff v. Cincinnati & I. R. Co.*, 1 Cincinnati (Superior Ct.), 264; *Franklin v. South Eastern R. Co.*, 3 Hurl. & N. 211; *Dalton v. South Eastern R. Co.*, 4 C. B. n. s. 296.

³ *State v. Baltimore & O. R. Co.*, 24 Md. 84.

⁴ *Penn. R. Co. v. Bantom*, 54 Pa. St. 495. See *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366.

⁵ *Grotenkemper v. Harris*, 25 Ohio St.

510; *Dunhene v. Ohio Life Ins. & T. Co.*, 1 Disney, 257.

⁶ *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302.

⁷ *Conant v. Griffin*, 48 Ill. 410; *Toledo, W., & W. R. Co. v. Brooks*, 81 Ill. 245; *Kansas Pacific R. Co. v. Miller*, 2 Col. 442. See this last case also as to proof of death.

⁸ *Baltimore & O. R. Co. v. State*, 33 Md. 542.

⁹ *Sauter v. New York Cent. & H. R. R. Co.*, 66 N. Y. 50, 6 Hun, 446; *Johnson v. Hudson River R. Co.*, 6 Duer, 633;

The declarations of the deceased as to the circumstances of the injury, made immediately after it occurred, are admissible as a part of the *res gestæ* in favor of the defendant in an action for damages on account of his death;¹ but, unless a part of the *res gestæ*, they are not, although dying declarations, admissible.²

Time when Right of Action vests. Statute of Limitations.—The right of action vests at the death which is the cause of action, and, on the death of the person entitled to it, descends to his or her representatives.³

The Statute of Limitations begins to run from the time of the death, although an administrator has not been appointed;⁴ but some authorities hold that it does not begin to run prior to such appointment.⁵

Louisville, C., & L. R. Co. *v.* Mahony, 7 Bush, 235; Donaldson *v.* Miss & M. R. Co., 18 Iowa, 280; Walters *v.* Chicago, R. I., & P. R. Co., 41 Iowa, 71, 36 Iowa, 458; Baltimore & O. R. Co. *v.* Noell, 32 Gratt. 394; South Western R. Co. *v.* Paulk, 24 Ga. 356; Macon & W. R. Co. *v.* Johnson, 33 Ga. 409; David *v.* South Western R. Co., 41 Ga. 223; Kansas Pacific R. Co. *v.* Lundin, 3 Col. 94; Denver, S. P., & P. R. Co. *v.* Woodward, 4 Col. 1. The opinion of a witness as to the length of time during which the deceased would have been probably useful to his family has been admitted. Penn. R. Co. *v.* Henderson, 51 Pa. St. 315.

¹ Stein *v.* Railway Co., 10 Phil. 440.

² Chicago & N. W. R. Co. *v.* Howard, 6 Brad. (Ill.) 569; Marshall *v.* Chicago &

G. E. R. Co., 48 Ill. 475; Brownell *v.* Pacific R. Co., 47 Mo. 239; Hyatt *v.* Adams, 16 Mich. 180; Daily *v.* New York & N. H. R. Co., 32 Conn. 356.

³ Waldo *v.* Goodsell, 33 Conn. 432.

⁴ Fowlkes *v.* Nashville & D. R. Co., 9 Heisk. 829, 5 Baxter, 663; Jeffersonville, M., & I. R. Co. *v.* Hendricks, 41 Ind. 48; Needham *v.* Grand Trunk R. Co., 38 Vt. 294, 306.

⁵ Andrews *v.* Hartford & N. H. R. Co., 34 Conn. 57; Sherman *v.* Western Stage Co., 24 Iowa, 515. For other cases concerning the limitation of actions and proceedings under the statute, see Commonwealth *v.* Boston & W. R. Co., 11 Cush. 512; Commonwealth *v.* East Boston Ferry Co., 13 Allen, 589; Pittsburg, C., & St. L. R. Co. *v.* Hine, 25 Ohio St. 629.

CHAPTER XV.

INJURIES TO CATTLE.

A RAILROAD company, as already seen, is entitled, except at crossings established by law or agreement, to the exclusive use of its track.¹ Its rights respecting cattle coming upon it are like those of any proprietor of the fee.²

Rule at Common Law requiring the Owner of Cattle to keep them on his own Land.—By an ancient rule of the common law an owner of cattle must keep them within his own close, and he becomes a trespasser if, without license, they go upon the land of another. The want of a fence between the adjoining closes is not a defence to an action for an entry of cattle from one upon the other, except where the owner of the close so entered upon is, by prescription, agreement, or otherwise, legally bound to support the fence, through the want of which the escape was made; but, if he is so bound, he cannot maintain an action for the entry of cattle lawfully on the other land, as it occurred through his own default.³

Applying this rule to a railroad company in its relation to land-owners, it is not, unless required by statute, bound to maintain fences along its location; and, while in the lawful exercise of its

¹ *Ante*, Chap. VII. p. 159.

² *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116; *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349, 5 Denio, 255; *Kerwhacker v. Cleveland, C., & C. R. Co.*, 3 Ohio St. 172; *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298; *Williams v. Mich. Cent. R. Co.*, 2 Mich. 259. The term "cattle," as employed in this chapter, includes not only beasts of the bovine genus, but also horses, mules, sheep, and swine. *Louisville & F. R. Co. v. Ballard*, 2 Met. (Ky.) 177, 183. The term "cattle and horses," in the Illinois statute, includes mules and

asses. *Ohio & M. R. Co. v. Brubaker*, 47 Ill. 462; *Toledo, W., & W. R. Co. v. Cole*, 50 Ill. 184. The term "cattle," in the English statute, includes pigs. *Child v. Hearn*, L. R. 9 Exch. 176.

³ *Rust v. Low*, 6 Mass. 90; *Thayer v. Arnold*, 4 Met. 589; *Bronson v. Coffin*, 108 Mass. 175, 185; *Little v. Lathrop*, 5 Greenl. 356; *Tewksbury v. Bucklin*, 7 N. H. 518; *Avery v. Maxwell*, 4 N. H. 36; *Lawrence v. Combs*, 37 N. H. 331; *Wells v. Howell*, 19 Johns. 385; *Richardson v. Milburn*, 11 Md. 340; *Gregg v. Gregg*, 55 Pa. St. 227; *Gardner v. Smith*, 7 Mich. 410.

powers, it is not liable to the owner of cattle coming within the location for injuries caused merely by the want of a fence. The company is not chargeable with any breach of duty in not maintaining a fence, and the owner who has suffered his cattle to intrude upon its premises is a trespasser.¹ The owner is also liable to the company for injuries to its trains or other property resulting from the trespass.²

The company, as already stated, is entitled to the exclusive occupation of its location, except at lawful crossings by public or private ways. It conducts within it the business of a common carrier, according to the usages peculiar to its kind of motive power. Speed and punctuality in the movement of its trains are most important for the public convenience and safety; and these ought not to be interfered with by any intrusion. The duty to use ordinary care defines the relations of parties who are each exercising a right, but it does not apply in favor of a trespasser, who can claim protection only against wanton injury. When, therefore, cattle which have come upon the track without any default of the company as to fencing, are injured by its engines, it is not liable merely because by the exercise of ordinary care it might have avoided the injury, but only when the injury has been caused by its reckless and wilful misconduct.³ Some authorities

¹ *Perkins v. Eastern R. Co.*, 29 Me. 307; *Woolson v. Northern R. Co.*, 19 N. H. 267; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161, 170; *Chapin v. Sullivan R. Co.*, 39 N. H. 53; *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116, 123; *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; *Morse v. Rutland & B. R. Co.*, 27 Vt. 49; *Tower v. Providence & W. R. Co.*, 2 R. I. 404; *Stearns v. Old Colony & F. R. R. Co.*, 1 Allen, 493; *Eames v. Salem & L. R. Co.*, 98 Mass. 560; *Terry v. New York Cent. R. Co.*, 22 Barb. 574; *Corwin v. New York & E. R. Co.*, 13 N. Y. 42, 46; *Vandegrift v. Rediker*, 2 Zab. 185; *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298; *Drake v. Phil. & E. R. Co.*, 51 Pa. St. 240; *Penn. R. Co. v. Riblet*, 66 Pa. St. 164; *Williams v. New Albany & S. R. Co.*, 5 Ind. 111; *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402; *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370; *Indianapolis, C., & L. R. Co. v. Harter*, 38 Ind. 557; *Alton & S. R. Co. v. Baugh*, 14 Ill. 211; *Wil-*

liams v. Mich. Cent. R. Co., 2 Mich. 259; *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288, 303; *Stucke v. Mil. & M. R. Co.*, 9 Wis. 202, 213; *Locke v. St. Paul & P. R. Co.*, 15 Minn. 350; *Vandegrift v. Delaware R. Co.*, 2 Houst. 287; *North Eastern R. Co. v. Sineath*, 8 Rich. 185, 194; *Cranston v. Cincinnati, H., & D. R. Co.*, 1 Handy (Cincinnati), 193.

² *Sinram v. Pittsburg, Ft. W., & C. R. Co.*, 28 Ind. 244; *Eames v. Salem & L. R. Co.*, 98 Mass. 560, 563; *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298; *North Eastern R. Co. v. Sineath*, 8 Rich. 185, 194.

³ *Munger v. Tonawanda R. Co.*, 4 N. Y. 349, 5 Denio, 255; *Hance v. Cayuga & S. R. Co.*, 26 N. Y. 428; *Spinner v. New York Cent. & H. R. R. Co.*, 67 N. Y. 153, 6 Hun, 600; *Clark v. Syracuse & U. R. Co.*, 11 Barb. 112; *Talmadge v. Rensselaer & S. R. Co.*, 13 Barb. 493; *Marsh v. New York & E. R. Co.*, 14 Barb. 364; *Terry v. New York Cent. R. Co.*, 22 Barb. 574; *Bowman v. Troy & B.*

make it liable for injury to cattle trespassing when it is chargeable with "gross negligence," but these terms are usually intended to convey the same meaning as wilful or wanton misconduct.¹

It is held, however, in some jurisdictions that the company, although not in default as to any duty to maintain a fence, is, when cattle come without right upon its track, liable for an injury to them which it might have avoided by the exercise of ordinary care. The owner's remote negligence or technical trespass in not keeping them within his own close, and in allowing them to stray upon the track, is held not to relieve the company of the obligation to use ordinary or reasonable care at the time to avoid injury to them. According to this rule, the company is liable to the owner for injuries to cattle wrongfully upon its track where it has failed to use ordinary care, although not at the time guilty of reckless and wilful misconduct.²

R. Co., 37 Barb. 516; *Mentges v. New York & H. R. Co.*, 1 Hilton, 425; *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298; *North Penn. R. Co. v. Rehman*, 49 Pa. St. 101; *Drake v. Phil. & E. R. Co.*, 51 Pa. St. 240; *Vandegrift v. Rediker*, 2 Zab. 185; *Price v. New Jersey, R., & T. Co.*, 3 Vroom, 19; *Tower v. Providence & W. R. Co.*, 2 R. I. 404; *Eames v. Salem & L. R. Co.*, 98 Mass. 560; *Maynard v. Boston & M. R.*, 115 Mass. 458; *McDonnell v. Pittsfield & N. A. R. Co.*, 115 Mass. 564; *Darling v. Boston & A. R. Co.*, 121 Mass. 118; *Williams v. New Albany & S. R. Co.*, 5 Ind. 111; *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141; *New Albany & S. R. Co. v. McNamara*, 11 Ind. 543; *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370; *Michigan Southern & N. I. R. Co. v. Fisher*, 27 Ind. 96; *Indianapolis, C., & L. R. Co. v. Harter*, 38 Ind. 557; *Jeffersonville, M., & I. R. Co. v. Huber*, 42 Ind. 173; *Jeffersonville, M., & I. R. Co. v. Adams*, 43 Ind. 402; *Jeffersonville, M., & I. R. Co. v. Underhill*, 48 Ind. 389; *Louisville & F. R. Co. v. Ballard*, 2 Met. (Ky.) 177; *O'Bannon v. Louisville, C., & L. R. Co.*, 8 Bush, 348; *Pritchard v. La Crosse & M. R. Co.*, 7 Wis. 232; *Chicago & N. W. R. Co. v. Goss*, 17 Wis. 428 (explaining *Stucke v. Mil. & M. R. Co.*, 9 Wis. 202); *Bennett v. Chicago & N. W. R. Co.*, 19 Wis. 145; *Fisher v. Farmers' Loan & T. Co.*, 21 Wis. 73; *Central Branch R. Co. v. Lea*,

20 Kan. 353 (modifying *Hopkins v. Kansas Pacific R. Co.*, 18 Kan. 462); *Atchison, T., & S. F. R. Co. v. Hegwir*, 21 Kan. 622; *Denver & R. G. R. Co. v. Olsen*, 4 Col. 239; *Williams v. Mich. Cent. R. Co.*, 2 Mich. 259. The duty of the owner to keep his cattle on his own land is held to exist even though the company has failed to fence according to agreement. *Drake v. Phil. & E. R. Co.*, 51 Pa. St. 240.

¹ See cases cited in note 3, p. 402.

² *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393; *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409; *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486 (modifying *Baltimore & O. R. Co. v. Lamborn*, 12 Md. 257); *Toledo, W., & W. R. Co. v. McGinnis*, 71 Ill. 346; *Illinois Cent. R. Co. v. Middlesworth*, 46 Ill. 494 (overruling the earlier cases: *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198; *Great Western R. Co. v. Thompson*, 17 Ill. 131; *Central Mil. Tract R. Co. v. Rockafellow*, 17 Ill. 541; *Illinois Cent. R. Co. v. Reedy*, 17 Ill. 580; *Chicago, B., & Q. R. Co. v. Cauffman*, 28 Ill. 513; *Illinois Cent. R. Co. v. Phelps*, 29 Ill. 447; *Illinois Cent. R. Co. v. Goodwin*, 30 Ill. 117); *Locke v. St. Paul & P. R. Co.*, 15 Minn. 350; *Witherell v. Mil. & St. P. R. Co.*, 24 Minn. 410; *Louisville & F. R. Co. v. Milton*, 14 B. Monr. 75; *Louisville & N. R. Co. v. Wainescott*, 3 Bush, 149; *Kentucky Cent. R. Co. v. Lebus*, 14 Bush, 518; *Nashville*

Rule at Common Law not adopted in some States.—The rule of the common law, that the owner of domestic animals must keep them on his own land, and is liable in trespass when they pass upon the land of another, is rejected in some States as unsuited to their circumstances and contrary to custom;¹ and it is held that, as he is not in fault for allowing them to stray upon the highway or unenclosed land, the company, although it may not be required to fence its track, is bound when they come upon it to use ordinary care to prevent injury to them, and is liable for an injury to them which it could by the exercise of such care have avoided. At the most, the owner's act in allowing his cattle to stray is, in such States, deemed only remote negligence, which does not relieve the company of the obligation to use ordinary care.²

But although the owner of cattle is not held liable in trespass when he allows them to stray on unenclosed lands where no sub-

& C. R. Co. v. Anthony, 1 Lea (Tenn.), 516; Indianapolis & C. R. Co. v. Caldwell, 9 Ind. 397; Trow v. Vt. Cent. R. Co., 24 Vt. 487; Jackson v. Rutland & B. R. Co., 25 Vt. 150; Kerwhacker v. Cleveland, C., & C. R. Co., 3 Ohio St. 172; Cincinnati, H., & D. R. Co. v. Waterson, 4 Ohio St. 424; Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 227.

¹ Studwell v. Ritch, 14 Conn. 292; Seeley v. Peters, 5 Gilman, 130; Headen v. Rust, 39 Ill. 186; Stoner v. Shugart, 45 Ill. 76; Russell v. Hanley, 20 Iowa, 219; Jones v. Witherspoon, 7 Jones (N. C.), 555; Burgwyn v. Whitfield, 81 N. C. 261.

² Kerwhacker v. Cleveland, C., & C. R. Co., 3 Ohio St. 172; Cincinnati, H., & D. R. Co. v. Waterson, 4 Ohio St. 424; Cleveland, C., & C. R. Co. v. Elliot, 4 Ohio St. 474; Central Ohio R. Co. v. Lawrence, 13 Ohio St. 66; Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 227; Marietta & C. R. Co. v. Stephenson, 24 Ohio St. 48; Cranston v. Cincinnati, H., & D. R. Co., 1 Handy (Cincinnati), 193; Illinois Central R. Co. v. Middlesworth, 46 Ill. 494 (overruling earlier cases); Illinois Cent. R. Co. v. Arnold, 47 Ill. 173; Illinois Cent. R. Co. v. Baker, 47 Ill. 295; Toledo, P., & W. R. Co. v. Ingraham, 58 Ill. 120; Toledo, P., & W. R. Co. v. Deacon, 63 Ill. 91; Rockford, R. I., & St. L. R. Co. v. Rafferty, 73 Ill. 58; Chicago

& A. R. Co. v. Engle, 84 Ill. 397; Alger v. Miss. & M. R. Co., 10 Iowa, 268; Balcom v. Dubuque & S. C. R. Co., 21 Iowa, 102; Whitbeck v. Dubuque & P. R. Co., 21 Iowa, 103; Evans v. Burlington & M. R. Co., 21 Iowa, 374; Smith v. Chicago, R. I., & P. R. Co., 34 Iowa, 506; Kuhn v. Chicago, R. I., & P. R. Co., 42 Iowa, 420; Vicksburg & J. R. Co. v. Patton, 31 Miss. 156; Miss. Cent. R. Co. v. Miller, 40 Miss. 45; Raiford v. Miss. Cent. R. Co., 43 Miss. 233; New Orleans, J., & G. N. R. Co. v. Field, 46 Miss. 573; Mobile & O. R. Co. v. Williams, 53 Ala. 595; Waters v. Moss, 12 Cal. 535; Richmond v. Sacramento Valley R. Co., 18 Cal. 351; Blaine v. Chesapeake & O. R. Co., 9 W. Va. 252; Baylor v. Balt. & O. R. Co., 9 W. Va. 270; Coyle v. Balt. & O. R. Co., 11 W. Va. 94; North Eastern R. Co. v. Sineath, 8 Rich. 185; Murray v. So. Car. R. Co., 10 Rich. 227; Brothers v. So. Car. R. Co., 5 S. C. n. s. 55; Rowe v. Greenville & C. R. Co., 7 S. C. n. s. 167; Gorman v. Pacific R. Co., 26 Mo. 441; Hannibal & St. J. R. Co. v. Kenney, 41 Mo. 271; Tarwater v. Hannibal & St. J. R. Co., 42 Mo. 193; McPheeters v. Han. & St. J. R. Co., 45 Mo. 22; Kaes v. Mo. Pacific R. Co., 6 Mo. App. 397; Georgia R. & B. Co. v. Neely, 56 Ga. 540; Laws v. North Car. R. Co., 7 Jones (N. C.), 468.

stantial damage is likely to be done, he is not, when so doing, in the condition of a person exercising a right; and he exposes them to injury when he allows them to stray in the vicinity of a railroad, or of a place where they are peculiarly liable to injury. Accordingly, it has been held in Pennsylvania, where the common-law rule is not adopted, that the company is not liable for an injury to cattle coming upon its track, unless inflicted wantonly, or with gross negligence amounting to wantonness.¹

Injuries to Cattle upon the Highway. — When cattle are lawfully passing upon a highway, at its intersection with the railroad, the company is bound to exercise ordinary care to prevent injury to them. The company and the owner are in such case each exercising a right, and bound to use ordinary care,² and their respective duties and liabilities are determined by the principles stated in a preceding chapter.³ The company is bound to use ordinary care to prevent injuries to cattle which are rightfully upon private crossings established by law or agreement, but the plaintiff's contributory negligence will defeat the action.⁴

It is lawful for proper purposes to drive cattle upon a highway,⁵ and whether the owner drove them with due care is a question for the jury.⁶ Allowing cattle unattended to run at large upon the highway is, except in jurisdictions which reject the rule of the common law as to the owner's duty to keep them within his own close, deemed an illegal use of the highway so as to make him a wrong-doer.⁷

Where cattle are by the owner's fault straying upon the highway and come thence upon the track at a place where the company is not required to maintain a fence, it is not liable for injury to them except for wanton injury,⁸ or, according to some authorities,

¹ *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298; *North Penn. R. Co. v. Rehman*, 49 Pa. St. 101; *Drake v. Phil. & E. R. Co.*, 51 Pa. St. 240. See *Knight v. Abert*, 6 Pa. St. 472. Decisions in Illinois to the same effect were overruled by *Illinois Cent. R. Co. v. Middlesworth*, 46 Ill. 494.

² *Beers v. Housatonic R. Co.*, 19 Conn. 566.

³ Chap. XII.

⁴ *White v. Concord R. Co.*, 30 N. H. 188; *Horn v. Atlantic & St. L. R. Co.*, 35

N. H. 169; *Housatonic R. Co. v. Waterbury*, 23 Conn. 101.

⁵ *Midland R. Co. v. Daykin*, 17 C. B. 126.

⁶ *Towne v. Nashua & L. R. Co.*, 124 Mass. 101.

⁷ *Corwin v. New York & E. R. Co.*, 13 N. Y. 42, 49; *Fitch v. Buffalo, N. Y., & P. R. Co.* 13 Hun, 668; *Bowman v. Troy & B. R. Co.*, 37 Barb. 516; *Halloran v. New York & H. R. Co.*, 2 E. D. Smith, 257; *Chicago, B., & Q. R. Co. v. Cauffman*, 28 Ill. 513, 38 Ill. 424.

⁸ *McDonnell v. Pittsfield & N. A. R.*

it is liable for negligence as well as for wanton injury.¹ The owner has been deemed in fault where the cattle escaped from his well-fenced field to the highway and thence went upon the track,² or when they escaped from him while being driven on the highway;³ but not if, after escaping, they came upon the track at a place where the company was required by statute to fence.⁴

Rate of Speed. Stopping of Train where Cattle are on the Track.

— The company is not bound to regulate its speed with reference to cattle which may be running at large in the vicinity of the railroad, or to lessen the rate with a view of diminishing the chances of injury to them by its engines, or, according to well-considered authorities, to stop or slacken the train in order to avoid or give way to an animal which is unlawfully on the railroad.⁵ Speed and punctuality in the movement of its trains and the safety of passengers are paramount considerations, to which private interests in property found on the track without right is subordinate.⁶ If it exceeds the rate prescribed by statute, it is liable for injuries caused thereby;⁷ but, in the absence of a statute limitation, no rate of speed is deemed negligence.⁸ The con-

Co., 115 Mass. 564; *Darling v. Boston & A. R. Co.*, 121 Mass. 118; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349, 5 Denio, 255; *Hance v. Cayuga & S. R. Co.*, 26 N. Y. 423.

¹ *Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283; *Chicago & A. R. Co. v. McMorro*, 67 Ill. 218; *Springfield & I. S. E. R. Co. v. Andrew*, 68 Ill. 57; *Chapin v. Sullivan R. Co.*, 39 N. H. 564.

² *North Penn. R. Co. v. Rehman*, 49 Pa. St. 101; *Mentges v. New York & H. R. Co.*, 1 Hilton, 425; *Darling v. Boston & A. R. Co.*, 121 Mass. 118; *Price v. New Jersey R. & T. Co.*, 2 Vroom, 229.

³ *McDonnell v. Pittsfield & N. A. R. Co.*, 115 Mass. 564.

⁴ *Spinner v. New York Cent. & H. R. Co.*, 67 N. Y. 153, 6 Hun, 600; *Bowman v. Troy & B. R. Co.*, 37 Barb. 516. *Contra*, *Darling v. Boston & A. R. Co.*, 121 Mass. 118.

⁵ *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66; *Bemis v. Conn. & P. R. R. Co.*, 42 Vt. 375, 379; *Raiford v. Miss. Cent. R. Co.*, 43 Miss. 233; *New Orleans, J., & G. N. R. Co. v. Field*, 46 Miss. 573; *White v. Utica & B. R. R. Co.*, 15 Hun,

333; *Eames v. Salem & L. R. Co.*, 98 Mass. 560, 563; *Darling v. Boston & A. R. Co.*, 121 Mass. 118; *Price v. New Jersey, R., & T. Co.*, 2 Vroom, 229, 233; *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486, 493; *Locke v. St. Paul & P. R. Co.*, 15 Minn. 350, 355; *Durham v. Wil. & W. R. Co.*, 82 N. C. 352. But see *Chicago & A. R. Co. v. Engle*, 84 Ill. 397; *Brown v. New York Cent. R. Co.*, 34 N. Y. 404; *Memphis & C. R. R. Co. v. Lyon*, 62 Ala. 71; *Aycock v. Wil. & W. R. Co.*, 6 Jones (N. C.), 231.

⁶ *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198, 204; *Louisville & F. R. Co. v. Ballard*, 2 Met. (Ky.) 177, 184; *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409, 424; *Maynard v. Boston & M. R.*, 115 Mass. 458, 460.

⁷ *Houston & T. C. R. W. Co. v. Terry*, 42 Tex. 451; *Toledo, P., & W. R. Co. v. Deacon*, 63 Ill. 91; *Indianapolis & St. L. R. Co. v. Peyton*, 76 Ill. 340; *Monahan v. Keokuk & D. M. R. Co.*, 45 Iowa, 523.

⁸ *McKonkey v. Chicago, B., & Q. R. Co.*, 40 Iowa, 205; *Maher v. Atlantic & P. R. Co.*, 64 Mo. 267. A high rate of speed has been admitted as evidence of

siderations in favor of human life which apply where persons are unlawfully on the track do not apply in favor of property.¹ Other authorities, however, hold the company liable where its servants, with proper vigilance, might have seen at a sufficient distance the trespassing cattle, and with due regard to the safety of passengers have stopped the train before it struck them, but failed to do so. This rule is adopted by the authorities which impose the duty of ordinary care, even in favor of wrongdoers.²

The company is under a superior obligation for the safety of persons and property on its trains, and is not bound to imperil their safety by an effort to stop the train in order to avoid injury to cattle which, without its fault, have come upon the track.³

The company is not required to stop its train where an animal is only near the track, and apparently not likely to come upon it.⁴ It is not liable for an injury to them where they come suddenly upon the track, and there is not time to stop the train before it strikes them.⁵

The company has been held not liable, even when it has failed to fence, for injuries to cattle which come upon its location, and fall into an unenclosed well within it.⁶ It is not bound, in order

negligence. *Edson v. Central R. Co.*, 40 Iowa, 47; *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22; *Pryor v. St. Louis, K. C., & N. R. Co.*, 69 Mo. 215. See *Morse v. Rutland & B. R. Co.*, 27 Vt. 49.

¹ *Bemis v. Conn. & P. R. R. Co.*, 42 Vt. 375, 382; *ante*, Chap. X. pp. 354, 355.

² *Louisville & N. R. Co. v. Wainscott*, 3 Bush, 149; *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227; *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77; *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 228; *Toledo, P., & W. R. Co. v. Bray*, 57 Ill. 514; *Toledo, P., & W. R. Co. v. Ingraham*, 58 Ill. 120; *Chicago & A. R. Co. v. Kellam*, 92 Ill. 245; *Pryor v. St. Louis, K. C., & N. R. Co.*, 69 Mo. 215; *Card v. New York & H. R. Co.*, 50 Barb. 89; *ante*, p. 403.

³ *Kerwhacker v. Cleveland, C., & C. R. Co.*, 3 Ohio St. 172, 199; *Cleveland, C., & C. R. Co. v. Elliott*, 4 Ohio St. 474; *Cranston v. Cincinnati, H., & D. R. Co.*, 1 Handy (Cincinnati), 198; *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198; *Louisville & F. R. Co. v. Ballard*, 2 Met. (Ky.) 177,

180, 181; *Price v. New Jersey, R., & T. Co.*, 3 Vroom, 19; *Witherell v. Mil. & St. P. R. Co.*, 24 Minn. 410. *Parker v. Dubuque S. W. R. Co.*, 34 Iowa, 399; *Sandham v. Chicago, R. I., & P. R. Co.*, 38 Iowa, 88; *Bemis v. Conn. & P. R. R. Co.*, 42 Vt. 375, 380, 385; *Parker v. Dubuque S. W. R. Co.*, 34 Iowa, 399; *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486, 493; *Pryor v. St. Louis, K. C., & N. R. Co.*, 69 Mo. 215.

⁴ *Peoria, P., & J. R. Co. v. Champ*, 75 Ill. 577; *Edson v. Central R. Co.*, 40 Iowa, 47. But see *Aycock v. Wil. & W. R. Co.*, 6 Jones (N. C.), 231. Compare *Chicago & A. R. Co. v. Kellam*, 92 Ill. 245.

⁵ *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77; *Chicago, B., & Q. R. Co. v. Bradfield*, 63 Ill. 220; *Louisville & N. R. Co. v. Wainscott*, 3 Bush, 149. But see *South & N. A. R. Co. v. Jones*, 56 Ala. 507.

⁶ *Hughes v. Han. & St. J. R. Co.*, 66 Mo. 325; *Illinois Cent. R. Co. v. Carraher*, 47 Ill. 333; *Aurora Branch R. Co. v. Grimes*, 13 Ill. 585.

to prevent injuries to cattle straying upon the track, to keep the excavations along its sides free from water and ice,¹ or to cover with plank or other material a culvert or drain crossed by the track.²

Signals. — The omission to give signals of warning which will alarm cattle is not in itself negligence, when they are not required by statute.³ But when they are so required the company is liable for injuries to cattle resulting from the omission.⁴ The omission, however, even when the signals are required, is not material, if it did not contribute to the injury; and evidence is required to connect the injury with the omission.⁵ The plaintiff whose negligence has contributed to the injury, cannot recover, although the required signals were not given.⁶

Duty to maintain Fences imposed by Statute. — The duty to maintain a fence on each side of the track, except at places where the fence would result in public convenience, is now quite generally imposed on railroad companies; but, as already stated, it is a duty created only by statute.⁷ The power of the legislature to

¹ *Peoria & R. I. R. Co. v. McClenahan*, 74 Ill. 435.

² *Memphis & C. R. Co. v. Lyon*, 62 Ala. 71.

³ *Flattes v. Chicago, R. I., & P. R. Co.*, 35 Iowa, 191; *Plaster v. Ill. Cent. R. Co.*, 35 Iowa, 449; *Jackson v. Chicago & N. W. R. Co.*, 36 Iowa, 451; *Michigan S. & N. I. R. Co. v. Fisher*, 27 Ind. 96.

⁴ *Chicago & R. I. R. Co. v. Reid*, 24 Ill. 144; *Great Western R. Co. v. Geddis*, 33 Ill. 304; *Toledo, W., & W. R. Co. v. Furgusson*, 42 Ill. 449; *Springfield & I. S. R. Co. v. Andrews*, 68 Ill. 56; *Howenstein v. Pacific R. Co.*, 55 Mo. 33; *Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386; *E. T. Va. & Ga. R. Co. v. Scales*, 2 Lea (Tenn.), 688.

⁵ *Illinois Cent. R. Co. v. Phelps*, 29 Ill. 447; *Illinois Cent. R. Co. v. Goodwin*, 30 Ill. 117; *Quincy, A., & St. L. R. Co. v. Wellhoener*, 72 Ill. 60; *Memphis & C. R. Co. v. Bibb*, 37 Ala. 699; *Stoneman v. Atlantic & P. R. Co.*, 58 Mo. 503; *Holman v. Chicago, R. I., & P. R. Co.*, 62 Mo. 562; *Hawker v. Balt. & O. R. Co.*, 15 W. Va. 628; *ante*, Chap. XII. p. 351.

⁶ *Ohio & M. R. Co. v. Eaves*, 42 Ill. 288; *Howenstein v. Pacific R. Co.*, 55

Mo. 33; *Owens v. Han. & St. J. R. Co.*, 58 Mo. 386.

⁷ Some cases of an exceptional character have seemed to regard the duty as existing in the absence of a statute provision. It was held in Vermont to be implied from reason and justice. *Quimby v. Vt. Cent. R. Co.*, 23 Vt. 387; *Trow v. Vt. Cent. R. Co.*, 24 Vt. 487, 492. But see *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116, 123. In New York, the law in relation to partition fences was at one time applied to railroad companies. *Rensselaer & S. R. Co., In re*, 4 Paige, 553. But see *Long Island R. Co., In re*, 3 Edw. Ch. 487. *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288, 305. Under a statute, the company and the land-owner has each been required to maintain one-half of the fence. *Sandusky & C. R. Co. v. Sloan*, 27 Ohio St. 341; *Dayton & M. R. Co. v. Miami County Infirmary*, 32 Ohio St. 566. Some cases have treated the company as chargeable with remote negligence in not fencing. *Kerwhacker v. Cleveland, C., & C. R. Co.*, 3 Ohio St. 172; *Cleveland, C., & C. R. Co. v. Elliott*, 4 Ohio St. 474; *Cincinnati, H., & D. R. Co. v. Waterson*, 4 Ohio St. 424; *Gor-*

require existing corporations to maintain fences along its track, and the power to impose a liability for double damages in case of injuries to cattle resulting from its neglect of the duty, will be considered in a later chapter.¹

A statute imposing the duty to fence is not presumed to be retrospective.² It is sometimes by express terms applied only to roads thereafter to be constructed.³ The statute requiring a company to fence the track has been construed according to its terms to apply as soon as the company commences running its road,⁴ or as soon as it begins the construction.⁵

The primary purpose of the statutes requiring the company to maintain fences is for the exclusion of cattle.⁶ They have been held not to be for the protection of employees,⁷ or persons traveling on the highway;⁸ but they have been held to be for the protection of children.⁹

The duty to maintain fences when imposed by statute may be enforced by mandamus.¹⁰ The land-owner may maintain an action to compel the company to build them.¹¹

Liability for Breach of the Statute Duty.—The company, when required by statute to maintain fences along its track, is liable for injuries to cattle which, being lawfully on the adjoining land,

man *v.* Pacific R. Co., 26 Mo. 441. In New Hampshire the duty of the company to fence, although not imposed in direct terms, has been implied from a statute which imposed a penalty after notice for its neglect to fence. The injured owner was not, however, confined to the statute remedy. *Dean v. Sullivan R. Co.*, 22 N. H. 316; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Horn v. Atlantic & St. L. R. Co.*, 35 N. H. 169; *Horne v. Atlantic & St. L. R. Co.*, 36 N. H. 440; *Chapin v. Sullivan R. Co.*, 39 N. H. 564. See as to right of action at common law, where a penalty is provided, *Norris v. Androscoggin R. Co.*, 39 Me. 273; *Iba v. Han. & St. J. R. Co.*, 45 Mo. 469.

¹ Chap. XVII. p. 463.

² *Stearns v. Old Colony & F. R. R. Co.*, 1 Allen, 493.

³ *Stearns v. Old Colony & F. R. R. Co.*, 1 Allen, 493; *Baxter v. Boston & W. R. R. Co.*, 102 Mass. 383; *Sawyer v. Vt. & M. R. Co.*, 105 Mass. 196; *Bronson v. Coffin*, 108 Mass. 175.

⁴ *Clark v. Vt. & C. R. Co.*, 28 Vt. 103; *Holden v. Rutland & B. R. Co.*, 30 Vt. 297; *Comings v. Han. & C. M. R. Co.*, 48 Mo. 512; *Baltimore, P., & C. R. Co. v. McClellan*, 59 Ind. 440. See *Cincinnati, W., & M. R. Co. v. Harris*, 61 Ind. 290.

⁵ *Gardner v. Smith*, 7 Mich. 410.

⁶ *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B. 549.

⁷ *Langlois v. Buffalo & R. R. Co.*, 19 Barb. 364; *Wabash R. Co. v. Brown*, 5 Brad. (Ill.) 590, 2 Brad. (Ill.) 516.

⁸ *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425, 5 Hun, 165.

⁹ *Schmidt v. Mil. & St. P. R. Co.*, 23 Wis. 186.

¹⁰ *People v. Rochester & S. L. R. Co.*, 14 Hun. 371.

¹¹ *Wademan v. Albany & S. R. Co.*, 51 N. Y. 568; *People v. Rochester & S. L. R. Co.*, 76 N. Y. 294, 14 Hun, 371; *Jones v. Seligman*, 16 Hun, 230, 10 N. Y. Week. Dig. 226.

pass thence on to the track through its failure to perform the duty so imposed, although it is not chargeable with any negligence in the management of its trains at the time of the injury.¹ The failure to fence, as required by statute, does not, however, make the company liable where the failure did not contribute to the injury.² But where the company, having performed its duty to maintain fences, or not being required to maintain them at certain places, has complied with the statute, it is not liable for injuries to cattle coming upon the track at places where it is not in default under the statute, unless it inflicts wilful injury upon them, or, according to some authorities, unless it might have avoided the injury by the exercise of ordinary care in the management of its engines at the time.³

If the original escape of the cattle was due to the company's failure to maintain a fence as required by law, it is liable, although they passed afterwards on to the land of others, and thence on to the track at a place where the company was also bound to fence.⁴

¹ *Norris v. Androscoggin R. Co.*, 39 Me. 273; *Rogers v. Newburyport R. Co.*, 1 Allen, 16; *Smith v. Eastern R. Co.*, 35 N. H. 356, 362; *Suydam v. Moore*, 8 Barb. 358; *Fanning v. Long Island R. Co.*, 2 Thomp. & C. 585; *Williams v. New Albany & S. R. Co.*, 5 Ind. 111; *Thayer v. St. Louis, A., & T. H. R. Co.*, 22 Ind. 26; *Jeffersonville, M., & I. R. Co. v. Ross*, 37 Ind. 545; *St. Louis, A., & T. H. R. Co. v. Linder*, 39 Ill. 433; *Rockford, R. I., & St. L. R. Co. v. Lynch*, 67 Ill. 149; *Toledo, P., & W. R. Co. v. Pence*, 68 Ill. 524; *Toledo, P., & W. R. Co. v. Logan*, 71 Ill. 191; *Toledo, P., & W. R. Co. v. Lavery*, 71 Ill. 522; *Toledo, P., & W. R. Co. v. Delehanty*, 71 Ill. 615; *Ohio & M. R. Co. v. Clutter*, 82 Ill. 123; *Burton v. North Mo. R. Co.*, 30 Mo. 372; *Miles v. Han: & St. J. R. Co.*, 31 Mo. 407; *Powell v. St. Joseph*, 31 Mo. 347; *Clark v. Han: & St. J. R. Co.*, 36 Mo. 202; *Nall v. St. Louis, K. C., & N. R. Co.*, 59 Mo. 112; *Cary v. St. Louis, K. C., & N. R. Co.*, 60 Mo. 209; *Small v. Chicago, R. I., & P. R. Co.*, 50 Iowa, 338, 341; *McCall v. Chamberlain*, 13 Wis. 637; *Bennett v. Chicago & N. W. R. Co.*, 19 Wis. 145, 149; *Blair v. Mil. & P. R. Co.*, 20 Wis. 254; *Brown v. Mil. & P. R. Co.*, 21 Wis. 39; *Sika v. Chicago & N. W. R. Co.*, 21 Wis. 370; *aliter*, if the company is by agreement

only, and not by statute, bound to fence, *Drake v. Phil. & E. R. Co.*, 51 Pa. St. 240.

² *Waldron v. Rensselaer & S. R. Co.*, 8 Barb. 390, 394; *Talmadge v. Rensselaer & S. R. Co.*, 13 Barb. 493, 496; *Joliet & N. I. R. Co. v. Jones*, 20 Ill. 221; *Atchison, T., & S. F. R. Co. v. Yates*, 21 Kan. 613. Where the company fails to fence, as required by statute, neither the company nor its tenant has a right of action against the adjoining owner whose cattle enter on its land through the defective fence. *Wiseman v. Booker*, L. R. 3 C. P. Div. 184.

³ *St. Louis, A., & T. H. R. Co. v. Linder*, 39 Ill. 433; *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226; *Toledo, W., & W. R. Co. v. Barlow*, 71 Ill. 640; *Illinois Cent. R. Co. v. Bull*, 72 Ill. 537; *Chicago, B., & Q. R. Co. v. Farrelly*, 3 Brad. (Ill.) 60; *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397; *Indiana Cent. R. Co. v. Gopen*, 10 Ind. 292; *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370; *Jeffersonville, M., & I. R. Co. v. Huber*, 42 Ind. 173; *Gill v. Atlantic & G. W. R. Co.*, 27 Ohio St. 240; *Nashville & D. R. Co. v. Comans*, 45 Ala. 437; *Swearingen v. M. K. & T. R. Co.*, 64 Mo. 73.

⁴ *Keliher v. Conn. River R. Co.*, 107

If the original escape is attributable to the company's fault, it is not relieved of liability by the subsequent wanderings of the animal, the maxim, *causa proxima non remota spectatur*, not applying.¹

The company is liable for damages to crops caused by cattle coming upon land through the want of proper fences, which it is bound to maintain.²

The Statute Duty to fence not to be transferred.—The company does not discharge its duty to erect a proper fence by employing another, even the land-owner, to build one; and if the person so employed erects an insufficient one, it is liable for the injuries resulting from the insufficiency.³

The duty of the company owning the road to fence, as required by statute, and its liability for injuries caused by the want of fences, continues, although the trains are run by contractors engaged in its construction;⁴ or the road is worked by other companies or persons under an agreement with or license from the company owning the road;⁵ or by lessees;⁶ but if the lease is authorized by law, and the lessor company does not retain any possession or control, its liability for the lessee's torts may well be doubted.⁷ Some authorities make the lessor and lessee, where both are using the track, each liable only for its own injuries to cattle.⁸

Liability of Parties operating the Road, though not owning it, as Lessees and Mortgagees.—The statutes are held generally to im-

Mass. 411; McDonnell v. Pittsfield & N. A. R. Co., 115 Mass. 564, 566.

¹ Gilman v. European & N. A. R. Co., 60 Me. 235.

² Donald v. St. Louis, K. C., & N. R. Co., 44 Iowa, 157.

³ Norris v. Androscoggin R. Co., 39 Me. 273; Illinois Cent. R. Co. v. Swearingen, 83 Ill. 289, 47 Ill. 206; Gill v. Atlantic & G. W. R. Co., 27 Ohio St. 240.

⁴ Chicago & St. P. & F. R. Co. v. McCarthy, 20 Ill. 385; Gardner v. Smith, 7 Mich. 410; Houston & G. N. R. Co. v. Meador, 50 Tex. 77.

⁵ Illinois Cent. R. Co. v. Finnigan, 21 Ill. 646; Illinois Cent. R. Co. v. Kanouse, 39 Ill. 272; Toledo, P., & W. R. Co. v. Rumbold, 40 Ill. 143; East St. Louis & C. R. Co. v. Gerber, 82 Ill. 632; Indianapo-

lis & M. R. Co. v. Soloman, 23 Ind. 534; Fort Wayne, M., & C. R. Co. v. Hinebaugh, 43 Ind. 354; Huey v. Indianapolis & V. R. Co., 45 Ind. 320; Bay City & E. S. R. Co. v. Austin, 21 Mich. 390; Wyman v. Penobscot & K. R. Co., 46 Me. 162.

⁶ Nelson v. Vt. & C. R. Co., 26 Vt. 717; Clement v. Canfield, 28 Vt. 302; Whitney v. Atlantic & St. L. R. Co., 44 Me. 362; Toledo, P., & W. R. Co. v. Rumbold, 40 Ill. 143; Clary v. Iowa Midland R. Co., 37 Iowa, 344; Kansas City, Ft. S., & G. R. Co. v. Ewing, 23 Kan. 273. See *ante*, Chap. X. pp. 283-285.

⁷ Ditchett v. Spuyten Duyvil & P. M. R. Co., 67 N. Y. 425, 5 Hun, 165.

⁸ Stephens v. Davenport & St. P. R. Co., 36 Iowa, 327; Clary v. Iowa Midland R. Co., 37 Iowa, 344.

pose the duty to fence, and the liability for injuries caused by the want of the required fence upon any companies or persons operating the road, although not owning it, as lessees;¹ parties using it under an agreement;² contractors engaged in construction;³ mortgagees in possession;⁴ a foreign corporation owning and using a road within the State.⁵

Liability under Statutes for Cattle wrongfully on the Adjoining Land.—The duty to fence, when imposed on the company by statute, may be imposed for the sole benefit of the adjoining owner and of others turning cattle rightfully upon his land, or it may be imposed as a general duty for the benefit of the public. Statutes of similar purport have received a different construction in this regard. At common law a proprietor of land, who was bound by agreement, prescription, or otherwise to fence his close against his neighbor, was bound to fence only against cattle rightfully on the adjoining close; that is, against those of its owner, or of others using it by lease, license, or under a right of way or of common. Accordingly, where A and B own adjoining closes between which A is bound to maintain the fence, if C's cattle first enter upon B's land wrongfully, and thence stray upon A's land through the want of the fence which A in neglect of duty has not supported, C is liable to A for the trespass.⁶ The same rule is applied to cattle straying upon the highway, the right of soil under which being in another, and the cattle being wrongfully there, except when they are being lawfully driven upon it.⁷ It

¹ *Clement v. Canfield*, 28 Vt. 302; *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433, 55 Barb. 529; *Illinois Cent. R. Co. v. Kanouse*, 39 Ill. 272; *Stewart v. Chicago & N. W. R. Co.*, 27 Iowa, 282 (distinguishing *Liddle v. Keokuk, Mt. P., & M. R. Co.*, 23 Iowa, 378); *Clary v. Iowa Midland R. Co.*, 37 Iowa, 344; *Downing v. Chicago, R. I., & P. R. Co.*, 43 Iowa, 96; *McCall v. Chamberlain*, 13 Wis. 637; *Cook v. Mil. & St. P. R. Co.*, 36 Wis. 45. See, as to an Indiana statute, *Pittsburg, C., & St. L. R. Co. v. Bolner*, 57 Ind. 572; *Pittsburg, C., & St. L. R. Co. v. Hannon*, 60 Ind. 417; *Pittsburg, C., & St. L. R. Co. v. Currant*, 61 Ind. 38; *Cincinnati, H., & D. R. Co. v. Bunnell*, 61 Ind. 183; *Jeffersonville, M., & I. R. Co. v. Downey*, 61 Ind. 287; *ante*, Chap. X. pp. 283-285.

² *Burchfield v. Northern Cent. R. Co.*, 57 Barb. 589; *East St. Louis & C. R. Co. v. Gerber*, 82 Ill. 632. But see *Parker v. Rensselaer & S. R. Co.*, 16 Barb. 315; *McGrath v. New York Cent. & H. R. R. Co.*, 1 Thomp. & C. 243.

³ *Gardner v. Smith*, 7 Mich. 410.

⁴ *Jones v. Selignam*, 16 Hun, 230, 10 N. Y. Week. Dig. 226.

⁵ *Purdy v. New York & N. H. R. Co.*, 61 N. Y. 353.

⁶ *Rust v. Low*, 6 Mass. 90; *Little v. Lathrop*, 5 Greenl. 356; *Lord v. Wormwood*, 29 Me. 282.

⁷ *Dovaston v. Payne*, 2 H. Bl. 527; *Stackpole v. Healy*, 16 Mass. 33; *Lord v. Wormwood*, 29 Me. 282; *Avery v. Maxwell*, 4 N. H. 36.

has also been applied to the construction of statutes requiring division fences between owners of adjoining closes.¹

The application of this rule of the common law to the interpretation of a statute imposing on the company the duty to make and maintain fences on the sides of its track depends on the question whether its purpose and intent, as gathered from its terms, appear to be the same as those of the statute which defines the obligations of adjoining owners in that respect. If it is designed merely for an adjustment of the duties and rights of the company and of adjoining owners, in respect to the division fences between them, simply imposing on grounds of private justice between the parties the entire burden on one, which under other laws of a like purpose is shared equally by both, then the company, under the rule of the common law already stated, is not liable, at least in the absence of negligence, for injuries to cattle unlawfully on the adjoining close, notwithstanding it has not complied with the statute requirement,—the duty being one which the adjoining owner could waive, and the default being one of which he only could complain. This is the construction placed in England on the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, § 68, which provides that the company shall make and maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners and occupiers thereof from straying thereout by reason of the railway. It was held that the obligation imposed by this section was the same as if the company had been bound by prescription at common law to repair the fences, and was for the protection only of the owners and occupiers of the adjoining close.² The statutes of several States in this country have been construed in the same manner.³

¹ *Lawrence v. Combs*, 37 N. H. 331.

² *Ricketts v. East & W. I. Docks & B. J. R. Co.*, 12 C. B. 160; *Manchester, S., & L. R. Co. v. Wallis*, 14 C. B. 213. One who hires of an occupier is within the protection of the act. *Dawson v. Midland R. Co.*, L. R. 8 Exch. 8.

³ *Perkins v. Eastern R. Co.*, 29 Me. 307; *Woolson v. Northern R. Co.*, 19 N. H. 267; *Towns v. Cheshire R. Co.*, 21 N. H. 363; *Cornwall v. Sullivan R. Co.*, 28

N. H. 161; *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 564; *Mayberry v. Concord R. Co.*, 47 N. H. 391; *Giles v. Boston & M. R.*, 55 N. H. 552; *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; *Morse v. Rutland & B. R. Co.*, 27 Vt. 49; *Bemis v. Conn. & P. R. R. Co.*, 42 Vt. 375; *Eames v. Salem & L. R. Co.*, 98 Mass. 560 (explaining *Browne v. Providence, H., & F. R. Co.*, 12 Gray, 55); *Maynard v. Boston & M. R.*, 116 Mass. 458; *McDonnell v. Pitts-*

The cattle of other persons are rightfully on the adjoining land when they are there by the license of its owner.¹ But if there is no such license, they are held wrongfully there, although their entry may be under circumstances which would not make the owner liable in trespass.²

Under this construction of the statute the company is not liable for injuries to cattle, at least in the absence of negligence, which have strayed upon the highway, and come upon the track through the want of the fence or cattle-guards which the company is by law bound to maintain. The cattle are unlawfully on the highway, unless they are being driven along, or, escaping while being driven along, the persons having charge of them make fresh pursuit.³ But the company is liable where cattle, when lawfully driven on the highway, come thence upon the track through a defect in a fence which it is required to maintain.⁴

Although the company, when bound to fence, may not be bound to fence against cattle unlawfully on the adjoining land, it is liable for wanton injury to them, and in some States for injury to them which it might have avoided in the exercise of ordinary care at the time of the injury.⁵

The statute may, however, be construed to be a general police regulation designed not merely for the benefit of adjoining owners, but for the protection of property in domestic animals gen-

field & N. A. R. Co., 115 Mass. 564; *Brooks v. New York & E. R. Co.*, 13 Barb. 594; *Walsh v. Va. & T. R. Co.*, 8 Nev. 110. As to the company's liability for cattle not belonging to the adjoining owner, but straying upon his land through his default in fencing, see *Underhill v. New York & H. R. Co.*, 21 Barb. 489; *Rust v. Low*, 6 Mass. 90.

¹ *Sawyer v. Vt. & M. R. Co.*, 105 Mass. 196. As to the right of one in possession by disseizin, see *Mayberry v. Concord R. Co.*, 47 N. H. 391.

² *McDonnell v. Pittsfield & N. A. R. Co.*, 115 Mass. 564.

³ *Woolson v. Northern R. Co.*, 19 N. H. 267; *Towns v. Cheshire R. Co.*, 21 N. H. 363; *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 564; *Giles v. Boston & M. R.*, 55 N. H. 552; *McDonnell v. Pittsfield & N. A. R. Co.*, 115 Mass. 564; *Trow v. Vt. Cent. R. Co.*, 24 Vt. 487, 494; *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150;

Tonawanda R. Co. v. Munger, 5 Denio, 255, 4 N. Y. 349; *Waldron v. Rensselaer & S. R. Co.*, 8 Barb. 390; *Clark v. Syracuse & U. R. Co.*, 11 Barb. 112; *Marsh v. New York & E. R. Co.*, 14 Barb. 364; *Halloran v. New York & H. R. Co.*, 2 E. D. Smith, 257; *Williams v. Mich. Cent. R. Co.*, 2 Mich. 259; *Vandegrift v. Rediker*, 2 Zab. 185; *Manchester, S., & L. R. Co. v. Wallis*, 14 C. B. 213.

⁴ *Midland R. Co. v. Daykin*, 17 C. B. 126; *Brady v. Rensselaer & S. R. Co.*, 1 Hun, 378.

⁵ *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150, 162; *Morse v. Rutland & B. R. Co.*, 27 Vt. 49; *Bemis v. Conn. & P. R. R. Co.*, 42 Vt. 375; *Trout v. Va. & T. R. Co.*, 23 Gratt. 619; *Williams v. New Albany & S. R. Co.*, 5 Ind. 111; *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141; *Maynard v. Boston & M. R.*, 115 Mass. 458; *McDonnell v. Pittsfield & N. A. R. Co.*, 115 Mass. 564.

erally, and for the safety of passengers who would be exposed to peril by collisions with cattle coming upon the track. When the statute is deemed to be of this character, the company is held to be under a general obligation to the public, and not under a limited obligation to adjoining land-owners; and when in default for not complying with the statute, it is liable for injuries to cattle unlawfully on the adjoining land, and coming therefrom upon its track. It is held chargeable with a breach of public duty, and liable to all persons suffering injury from its default. Thus, in an English case, where the company failed to keep gates constantly closed, as required by statute, it was held immaterial that horses had strayed from the owner's field into the highway, and thence upon the track.¹ The statute of New York² is held to impose a general duty of erecting and maintaining fences on the sides of the road for the public benefit and security, and for the benefit of the owners of cattle generally, without any limitation to cattle lawfully on the adjoining premises;³ and the same construction has been put upon similar statutes, in several other States.⁴ Under this construction of the statute the company is not relieved of liability for injuries to

¹ *Fawcett v. York & N. M. R. Co.*, 16 Q. B. 610.

² The statute is as follows: "Every corporation formed under this act shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with openings or gates or bars therein, and farm-crossings of the road for the use of the proprietors of lands adjoining such railroads; and also construct and maintain cattle-guards at all road-crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad. Until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines, to cattle, horses, or other animals thereon; and, after such fences and guards shall be duly made and maintained, the corporation shall not be liable for any such damages unless negligently or wilfully done." Laws of 1850, ch. 140, § 44.

³ *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Bradley v. Buffalo, N. Y., & E. R. Co.*, 34 N. Y. 427; *Shepard v. Buffalo,*

N. Y., & E. R. Co., 35 N. Y. 641; *Purdy v. New York & N. H. R. Co.*, 61 N. Y. 353; *Spinner v. New York Cent. & H. R. Co.*, 67 N. Y. 153, 6 Hun, 600; *Duffy v. New York & H. R. Co.*, 2 Hilton, 496; *Sheaf v. Utica & B. R. R. Co.*, 2 Thomp. & C. 388; *White v. Utica & B. R. R. Co.*, 15 Hun, 333; *Crawford v. New York Cent. & H. R. Co.*, 18 Hun, 108.

⁴ *Indianapolis & C. R. Co. v. Townsend*, 10 Ind. 38; *Jeffersonville R. Co. v. Applegate*, 10 Ind. 49; *New Albany & S. R. Co. v. Maiden*, 12 Ind. 10; *Indianapolis & C. R. Co. v. Guard*, 24 Ind. 222; *Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283; *Marietta & C. R. Co. v. Stephenson*, 24 Ohio St. 48; *McCall v. Chamberlain*, 13 Wis. 637; *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665; *Gillam v. Sioux City & St. P. R. Co.*, 9 Reporter, 375; *Toledo, W., & W. R. Co. v. Fergusson*, 42 Ill. 449; *Browne v. Providence, H., & F. R. Co.*, 12 Gray, 55 (explained by *Eames v. Salem & L. R. Co.*, 98 Mass. 560); *Nashville & C. R. Co. v. Peacock*, 25 Ala. 229; *Kaes v. Mo. Pacific R. Co.*, 6 Mo. App. 397. See *Gilman v. European & N. A. R. Co.*, 60 Me. 235.

cattle coming upon the unfenced track without right by the adjoining owner's covenant to maintain the fence, such covenant being held to affect its liability to the covenantor only, but not to strangers.¹

The plaintiff cannot, even under this construction of the statute, recover for an injury arising from the company's default, where by some wilful or positive act he exposed his cattle to danger.²

Kind of Fence required by Statute.—The kind of fence, unless prescribed by statute, may be any kind which is reasonably fitted for the purpose. Whether it is a suitable one is not a question on which the opinion of experts is competent testimony.³ The kind may be determined by the agreement of the parties.⁴ When not prescribed by statute, it is not necessarily the kind required by statute to be maintained between adjoining proprietors;⁵ but some statutes which require railroad companies to maintain fences adopt by reference, or are construed as adopting, such division fences as the standard.⁶ In New York, the crooked or Virginia fence, which alternately projects beyond and recedes within the location, being a customary division fence, is held to be a sufficient railroad fence.⁷

The fence must be on both sides of the railroad.⁸ It must, under some statutes, be sufficient to prevent the entry of sheep and pigs.⁹ It will satisfy the statute if it confines cattle of ordinary disposition, although it may not prove a barrier, under exceptional circumstances, in the case of cattle which are peculiarly restive.¹⁰ A bluff, hedge, or ditch may be a barrier equivalent to

¹ *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.

² *Corwin v. New York & E. R. Co.*, 13 N. Y. 42, 48; *Brady v. Rensselaer & S. R. Co.*, 1 Hun, 378; *Indianapolis & C. R. Co. v. Townsend*, 10 Ind. 38.

³ *Swartout v. New York Cent. & H. R. R. Co.*, 7 Hun, 571; *Enright v. San Francisco & S. J. R. Co.*, 33 Cal. 230. But see *Louisville, N. A., & C. R. Co. v. Spain*, 61 Ind. 460.

⁴ *Ellis v. London & S. W. R. Co.*, 2 Hurl. & N. 424; *Enright v. San Francisco & S. J. R. Co.*, 33 Cal. 230.

⁵ *Eames v. Salem & L. R. Co.*, 98 Mass. 560; *Bronson v. Coffin*, 108 Mass. 175, 189.

⁶ *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Enright v. San Francisco & S. J. R. Co.*, 33 Cal. 230; *Toledo & W. R. Co. v. Thomas*, 18 Ind. 215.

⁷ *Ferris v. Van Buskirk*, 18 Barb. 397.

⁸ *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433, 437; *Eames v. Salem & L. R. Co.*, 98 Mass. 560; *Tredway v. Sioux City & St. P. R. Co.*, 43 Iowa, 527, 39 Iowa, 663.

⁹ *Bessant v. Great Western R. Co.*, 8 C. B. N. S. 368; *Child v. Hearn*, L. R. 9 Exch. 176; *Fernow v. Dubuque & S. W. R. Co.*, 22 Iowa, 528. But see *Atchison, T., & S. F. Co. v. Yates*, 21 Kan. 613.

¹⁰ *Child v. Hearn*, L. R. 9 Exch. 176, 182; *Chicago & A. R. Co. v. Utley*, 38 Ill. 410.

a fence.¹ Willow-trees, being injurious to the adjoining owner's land, have been deemed an improper fence, in the absence of a controlling necessity, and the company has been enjoined at his instance from planting them for the purpose.² A company, which enclosed its track with a fence made of two wires with projecting barbs, it has been held, must use due diligence to prevent cattle being driven by fright upon it when attempting to escape from the track.³ It must not leave openings in fences, other than lawful gates, bars, or crossings.⁴

Cattle-guards. Private Crossings.—Cattle-guards are held to be a part of a secure and proper fence.⁵ They should be so placed and constructed as to be effective in excluding cattle.⁶ By some statutes they are not required at private crossings.⁷

The New York statute, as construed, requires cattle-guards at the streets of villages as well as at highways in the country, but they must be of a mode of construction which will not impede public travel.⁸ It requires them at crossings near stations, although causing inconvenience to the company,⁹ but not at farm crossings.¹⁰ The land-owner cannot, except under statute authority, make them across or under the railroad, as such erections interfere with the company's right to the exclusive use of its location for its own purposes.¹¹

The company is required to keep in repair cattle-guards which

¹ *Hilliard v. Chicago & N. W. R. Co.*, 37 Iowa, 442.

² *Brock v. Conn. & P. R. R. Co.*, 35 Vt. 373.

³ *Atlanta & W. P. R. Co. v. Hudson*, 62 Ga. 679.

⁴ *Cleveland, C. C., & I. R. Co. v. Swift*, 42 Ind. 119.

⁵ *New Albany & S. R. Co. v. Pace*, 13 Ind. 411; *Indianapolis, P., & C. R. Co. v. Irish*, 26 Ind. 268; *Pittsburg, C., & St. L. R. Co. v. Eby*, 55 Ind. 567. See *Smith v. Chicago, C., & D. R. Co.*, 38 Iowa, 518.

⁶ *Jeffersonville, M., & I. R. Co. v. Morgan*, 38 Ind. 190; *Indianapolis, C., & L. R. Co. v. Bonnell*, 42 Ind. 539; *Pittsburg, C., & St. L. R. Co. v. Eby*, 55 Ind. 567.

⁷ *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa, 188.

⁸ *Brace v. New York Cent. R. Co.*, 27

N. Y. 269 (qualifying *Vanderkar v. Rensselaer & S. R. Co.*, 13 Barb. 390; *Parker v. Rensselaer & S. R. Co.*, 16 Barb. 315); *Crawford v. New York Cent. & H. R. R. Co.*, 18 Hun, 108. See *Halloran v. New York & H. R. Co.*, 2 E. D. Smith, 257; *Bowman v. Troy & B. R. Co.*, 37 Barb. 516; *Towns v. Cheshire R. Co.*, 21 N. H. 363; *Peoria, P., & J. R. Co. v. Barton*, 80 Ill. 72.

⁹ *Bradley v. Buffalo, N. Y., & E. R. Co.*, 34 N. Y. 427; *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433, 55 Barb. 529.

¹⁰ *Brooks v. New York & E. R. Co.*, 13 Barb. 594; *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa, 188; *Cook v. Mil. & St. P. R. Co.*, 36 Wis. 46.

¹¹ *Alton & S. R. Co. v. Baugh*, 14 Ill. 211; *St. Louis, V., & T. H. R. Co. v. Mollet*, 59 Ill. 235.

it is required to build,¹ and is in default if it allows them to be obstructed by snow.²

What is an adequate private crossing depends largely on its position and the circumstances of the case.³ At such a crossing, bars or gates are to be left in the fence;⁴ and they are, when required as a part of the fence, to be maintained by the company.⁵ The company, under the statute of New York, has the right to select the place of crossing, but it must exercise it reasonably, having reference to the convenience of both parties.⁶ A "farm crossing" means a passage over as well as under the railroad.⁷ The duty to make such a crossing is held to be incumbent on the company, whether it acquires its land by purchase or under legal proceedings.⁸

Liability as to Defects in Fences caused by Casualties or Trespassers.

— The statute provision requiring the company to maintain fences does not impose an absolute liability for defects casually occurring. Its liability for injuries from defects in the fence, occurring after its construction, depends on the question whether it has used ordinary care, or been negligent in performing the duty to repair and maintain it.⁹ If the fence, without the company's negligence or wrongful act, is destroyed by fire, or thrown down by a storm or breachy cattle, the company will be liable for an injury resulting therefrom, which occurs after notice of the defect (or its existence for a length of time sufficient to justify the presumption of notice), and a reasonable opportunity to repair it.¹⁰ It is entitled to a reasonable time to discover and

¹ *Chicago & R. I. R. Co. v. Reid*, 24 Ill. 144.

² *Dunnigan v. Chicago & N. W. R. Co.*, 18 Wis. 28; *Hance v. Cayuga & S. R. Co.*, 26 N. Y. 428.

³ *Gray v. Burlington & M. R. Co.*, 37 Iowa, 119; *Horne v. Atlantic & St. L. R. Co.*, 36 N. H. 440, 445.

⁴ *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116; *Peoria, P., & J. R. Co. v. Barton*, 80 Ill. 72.

⁵ *Mackie v. Central R. Co.*, 6 Northwest. Rep. 723.

⁶ *Wademan v. Albany & S. R. Co.*, 51 N. Y. 568 (overruling *Wheeler v. Rochester & S. R. Co.*, 12 Barb. 227).

⁷ *Wheeler v. Rochester & S. R. Co.*, 12 Barb. 227; *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500.

⁸ *Clarke v. Rochester, L., & N. F. R. Co.*, 18 Barb. 350.

⁹ *Murray v. New York Cent. R. Co.*, 3 Abbott Ct. App. 339; *Lemmon v. Chicago & N. W. R. Co.*, 32 Iowa, 151; *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665; *Robinson v. Grand Trunk R. Co.*, 32 Mich. 322.

¹⁰ *Toledo & W. R. Co. v. Daniels*, 21 Ind. 256; *Indianapolis, P., & C. R. Co. v. Truitt*, 24 Ind. 162; *Toledo, W., & W. R. Co. v. Cohen*, 44 Ind. 444; *Cleveland, C. C., & I. R. Co. v. Brown*, 45 Ind. 90; *Pittsburg, C., & St. L. R. Co. v. Eby*, 55 Ind. 567; *Illinois Cent. R. Co. v. Dickerson*, 27 Ill. 55; *Illinois Cent. R. Co. v. Swearingen*, 33 Ill. 289, 47 Ill. 206; *Chicago & A. R. Co. v. Umphenour*, 69 Ill. 198; *Toledo, W., & W. R. Co. v. Nelson*,

repair the defect where the fence, without its authority or knowledge, is thrown down by third persons.¹ An owner who has knowledge of the defect should notify the company.²

The burden of proof is on the plaintiff to show the company's knowledge of the defect.³ Actual notice is not necessary, and knowledge may be inferred from lapse of time after the fence was thrown down or gates left open.⁴ The company is, however, not required to keep a constant patrol for the purpose of discovering casual defects in fences, or the leaving open of gates.⁵ The burden of proof is on the plaintiff to show that bars made for his accommodation were left down without his negligence.⁶

Gates and Bars. — The company is required to keep in repair gates and bars which are a part of the fence.⁷ It is required to use reasonable diligence to keep them closed; but it is liable for injuries resulting from their being left open by third persons only when it fails to use such diligence to discover that they are open, and to close them.⁸ It is liable if they are left open by its servants or by customers who pass through them with its implied

77 Ill. 160; *Aylesworth v. Chicago, R. I., & P. R. Co.*, 30 Iowa, 459; *Hilliard v. Chicago & N. W. R. Co.*, 37 Iowa, 442; *Davis v. Chicago, R. I., & P. R. Co.*, 40 Iowa, 292; *McCormick v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 193; *Wheeler v. Erie R. Co.*, 2 Thomp. & C. 634; *Lawrence v. Mil., L. S., & W. R. Co.*, 42 Wis. 322, 326.

¹ *Munch v. New York Cent. R. Co.*, 29 Barb. 647; *McDowell v. New York Cent. R. Co.*, 37 Barb. 195; *Spinner v. New York Cent. & H. R. R. Co.*, 67 N. Y. 153, 156, 6 Hun, 600; *Toledo & W. R. Co. v. Fowler*, 22 Ind. 316; *Great Western R. Co. v. Helm*, 27 Ill. 198; *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226; *Chicago & A. R. Co. v. Saunders*, 85 Ill. 288; *Indianapolis & St. L. R. Co. v. Hall*, 88 Ill. 368.

² *Poler v. New York Cent. R. Co.*, 16 N. Y. 476; *Chicago, B., & Q. R. Co. v. Seirer*, 60 Ill. 295.

³ *Perry v. Dubuque Southwestern R. Co.*, 36 Iowa, 102.

⁴ *Aylesworth v. Chicago, R. I., & P. R. Co.*, 30 Iowa, 459; *Perry v. Dubuque*

Southwestern R. Co., 36 Iowa, 102; *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa, 168; *Toledo, W., & W. R. Co. v. Cohen*, 44 Ind. 444.

⁵ *Illinois Cent. R. Co. v. Dickerson*, 27 Ill. 55; *Illinois Cent. R. Co. v. Swearingen*, 33 Ill. 189, 47 Ill. 206; *Illinois Cent. R. Co. v. McKee*, 43 Ill. 119; *Chicago & N. W. R. Co. v. Harris*, 54 Ill. 528; *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226.

⁶ *Waldron v. Portland, S., & P. R. Co.*, 85 Me. 422; *Eames v. Boston & W. R. Co.*, 14 Allen, 151.

⁷ *Estes v. Atlantic & St. L. R. Co.*, 63 Me. 308; *Illinois Cent. R. Co. v. Arnold*, 47 Ill. 173; *Chicago & N. W. R. Co. v. Harris*, 54 Ill. 528; *Mackie v. Central R. Co.*, 6 Northwest. Rep. 723.

⁸ *Illinois Cent. R. Co. v. McKee*, 43 Ill. 119; *Illinois Cent. R. Co. v. Arnold*, 47 Ill. 173; *Chicago & N. W. R. Co. v. Harris*, 54 Ill. 528; *Chicago, B., & Q. R. Co. v. Magee*, 60 Ill. 529; *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa, 188; *Russell v. Hanley*, 20 Iowa, 219.

license;¹ but it is not liable if the owner or occupier of the land, or the servant of either, leaves them open.²

Where, the company not being required by law to supply gates or bars, the land-owner makes them, or has them made for his own convenience, he and his tenants must see that they are kept closed, and the company is not under an obligation to maintain or keep them closed;³ and if the cattle of other persons are wrongfully on his land, and come on the track through gates so made, the company, when not negligent in running its trains, is not liable.⁴

Places to remain unfenced. Crossings of Public and Private Ways.

— A statute which in general terms imposes on the company the duty to fence, is construed as allowing exceptions required by the public necessity or convenience. Thus, it is not required to fence the track where it crosses highways,⁵ or runs upon them;⁶ but the duty to fence is incumbent where it runs on the side of the highway,⁷ or is the terminus of streets.⁸

The crossings of private ways have also been admitted as an exception,⁹ particularly when the land-owner has requested them to be kept open;¹⁰ but the company is liable for injuries caused by

¹ *Chapman v. New York Cent. R. Co.*, 33 N. Y. 369, 31 Barb. 399; *Spinner v. New York Cent. & H. R. R. Co.*, 67 N. Y. 153, 6 Hun, 600, 2 Hun, 421, 4 Thomp. & C. 595.

² *Illinois Cent. R. Co. v. McKee*, 43 Ill. 119; *Illinois Cent. R. Co. v. Arnold*, 47 Ill. 173; *Koutz v. Toledo, W., & W. R. Co.*, 54 Ind. 515; *Russell v. Hanley*, 20 Iowa, 219; *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa, 168; *Henderson v. Chicago, R. I., & P. R. Co.*, 39 Iowa, 220, 43 Iowa, 620, 48 Iowa, 216; *Eames v. Boston & W. R. Co.*, 14 Allen, 151; *Waldron v. Portland, S., & P. R. Co.*, 35 Me. 422; *Hook v. Worcester & N. R. Co.*, 9 Reporter, 348. But *aliter* in some jurisdictions if the cattle belong to a person who is not the owner or occupier of the adjoining land. *Laude v. Chicago & N. W. R. Co.*, 33 Wis. 640.

³ *Indianapolis, P., & C. R. Co. v. Shimer*, 17 Ind. 295; *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340; *Koutz v. Toledo, W., & W. R. Co.*, 54 Ind. 515.

⁴ *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340.

⁵ *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471; *Ohio & M. R. Co. v. Rowland*, 50 Ind. 349; *Soward v. Chicago & N. W. R. Co.*, 30 Iowa, 551, 33 Iowa, 386; *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116, 124; *Meyer v. North Mo. R. Co.*, 35 Mo. 352; *McPheeters v. Han. & St. J. R. Co.*, 45 Mo. 22; *Iba v. Han. & St. J. R. Co.*, 45 Mo. 469; *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510.

⁶ *Indianapolis, C., & L. R. Co. v. Warner*, 35 Ind. 515.

⁷ *Indianapolis & C. R. Co. v. Guard*, 24 Ind. 222; *Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283.

⁸ *Toledo, W., & W. R. Co. v. Cary*, 37 Ind. 172.

⁹ *Indianapolis, P., & C. R. Co. v. Shimer*, 17 Ind. 295; *Bellefontaine R. Co. v. Suman*, 29 Ind. 40.

¹⁰ *Tyson v. K. & D. M. R. Co.*, 43 Iowa, 207.

not fencing across private ways, which it had the right to fence, unless the owner has waived the duty.¹

Fences at Station Grounds. — The company is not required, under the general duty to maintain fences imposed by statute, to enclose the grounds about its stations for freight and passengers, which are required to be kept open for the public convenience;² or the space used for switches and side-tracks;³ or even a mill communicating with the railroad.⁴

Fences in Cities and Villages. Enclosed Lands. — The company, under the general requirement, is bound to fence its track in cities and villages as well as in the open country;⁵ but in some States they are excepted by statute.⁶ In Missouri, the duty to fence is confined to enclosed or cultivated fields and unenclosed prairie lands,⁷ excluding towns and cities⁸ and timber lands.⁹ In Maine,

¹ *Indiana Cent. R. Co. v. Leamon*, 18 Ind. 173; *Indianapolis & C. R. Co. v. Lowe*, 29 Ind. 545; *McKinley v. Chicago, R. I., & P. R. Co.*, 47 Iowa, 76; *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116, 124.

² *Indianapolis & C. R. Co. v. Oestel*, 20 Ind. 231; *Jeffersonville, M., & I. R. Co. v. Beatty*, 36 Ind. 15; *Indianapolis & St. L. R. Co. v. Christy*, 43 Ind. 143; *Pittsburg, C., & St. L. R. Co. v. Bowyer*, 45 Ind. 496; *Indianapolis, P., & C. R. Co. v. Crandall*, 58 Ind. 365; *Davis v. Burlington & M. R. R. Co.*, 26 Iowa, 549; *Durand v. Chicago & N. W. R. Co.*, 26 Iowa, 559; *Packard v. Ill. Cent. R. Co.*, 30 Iowa, 474; *Comstock v. Des Moines Valley R. Co.*, 32 Iowa, 376; *Smith v. Chicago, R. I., & P. R. Co.*, 34 Iowa, 506; *Clary v. Iowa Midland R. Co.*, 37 Iowa, 344; *Latty v. B., C. R., & M. R. Co.*, 38 Iowa, 250; *Cole v. Chicago & N. W. R. Co.*, 38 Iowa, 311; *Galena & C. U. R. Co. v. Griffin*, 31 Ill. 303; *Great Western R. Co. v. Morthland*, 30 Ill. 451; *Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Morris v. St. Louis, K. C., & N. R. Co.*, 58 Mo. 78; *Robertson v. Atlantic & P. R. Co.*, 64 Mo. 412; *Swearingen v. Mo., K., & T. R. Co.*, 64 Mo. 73; *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510; *Blair v. Mil. & P. R. Co.*, 20 Wis. 254. But see *Bellefontaine R. Co. v. Reed*, 33 Ind. 476; *Bradley v. Buffalo, N. Y., & E. R. Co.*, 34 N. Y. 427; *Crawford v. New York Cent. & H. R. R. Co.*, 18 Hun, 108. Compare *Roberts v. Great Western R. Co.*, 4 C. B. n. s. 506.

³ *Ohio & M. R. Co. v. Rowland*, 50 Ind. 349. But see *Comstock v. Des Moines Valley R. Co.*, 32 Iowa, 376; *Morris v. St. Louis, K. C., & N. R. Co.*, 58 Mo. 78.

⁴ *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402; *Pittsburg, C., & St. L. R. Co. v. Bowyer*, 45 Ind. 496; *Ohio & M. R. Co. v. Rowland*, 50 Ind. 349.

⁵ *Cleveland & P. R. Co. v. McConnell*, 26 Ohio St. 57; *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471; *Jeffersonville, M., & I. R. Co. v. Parkhurst*, 34 Ind. 501; *Toledo, W., & W. R. Co. v. Howell*, 38 Ind. 447; *Toledo, W., & W. R. Co. v. Owen*, 43 Ind. 405; *Ells v. Pacific R. Co.*, 48 Mo. 231; *Crawford v. New York Cent. & H. R. R. Co.*, 18 Hun, 108.

⁶ *Illinois Cent. R. Co. v. Williams*, 27 Ill. 48; *Toledo, W., & W. R. Co. v. McGinnis*, 71 Ill. 346; *Toledo, W., & W. R. Co. v. Spangler*, 71 Ill. 568; *Illinois Cent. R. Co. v. Bull*, 72 Ill. 537; *Flint & P. M. R. Co. v. Bull*, 28 Mich. 510.

⁷ *Cecil v. Pacific R. Co.*, 47 Mo. 246; *Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Biggerstaff v. St. Louis, K. C., & N. R. Co.*, 60 Mo. 567.

⁸ *Wier v. St. Louis & I. M. R. Co.*, 48 Mo. 558; *Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Gerren v. Han. & St. J. R. Co.*, 60 Mo. 405; *Edwards v. Han. & St. J. R. Co.*, 66 Mo. 567; *Cousins v. Han. & St. J. R. Co.*, 66 Mo. 572. See *Ells v. Pacific R. Co.*, 48 Mo. 231.

⁹ *Tiarks v. St. Louis & I. M. R. Co.*,

the duty is limited to enclosed or improved lands, or wood-lots belonging to a farm.¹

Fences at Embankments, &c. — The company is required to fence the railroad when laid on an embankment erected in the bed of a canal,² or on the tow-path of one which is abandoned;³ or where the embankment is not sufficient to prevent cattle coming on the track;⁴ or where one railroad is laid by the side of another.⁵ But the duty has been held not to be incumbent in the case of a railroad laid upon public lands,⁶ or in the waters of the Hudson River.⁷

Liability for Injuries to Cattle coming on the Track at Places where the Company is not required to maintain Fences. — The company is not, at least in the absence of negligence, liable for injuries to cattle coming upon the track at places where, by the construction of the statute, it is not permitted or required to maintain a fence.⁸

Injury by Fright arising from Neglect to Fence. — The injury may be inflicted, without a collision, by the animals taking fright at the noise of the train. In either case the company is liable if the injury is caused by its failure to fence its track as required by law.⁹

The Owner's Waiver of the Company's Duty to Fence. — The duty to maintain fences and gates, imposed by statute on the company

58 Mo. 45; *Walton v. St. Louis, I. M., & S. R. Co.*, 67 Mo. 56; *Schable v. Han. & St. J. R. Co.*, 69 Mo. 91.

¹ *Perkins v. Eastern R. Co.*, 29 Me. 307; *Gilman v. European & N. A. R. Co.*, 60 Me. 235.

² *White Water Valley R. Co. v. Quick*, 31 Ind. 127.

³ *White Water Valley R. Co. v. Quick*, 30 Ind. 127.

⁴ *Toledo, P., & W. R. Co. v. Sweeney*, 41 Ill. 226.

⁵ *Shepard v. Buffalo, N.Y., & E. R. Co.*, 35 N. Y. 641.

⁶ *Walsh v. Va. & T. R. Co.*, 8 Nev. 110.

⁷ *Schermerhorn v. Hudson River R. Co.*, 38 N. Y. 103.

⁸ *Indianapolis, C., & L. R. Co. v. Warner*, 35 Ind. 515; *Jeffersonville, M., & I. R. Co. v. Huber*, 42 Ind. 173; *Davis v. Burlington & M. R. R. Co.*, 26 Iowa, 549; *Illinois Cent. R. Co. v. Bull*, 72 Ill. 537.

⁹ *Young v. St. Louis, K. C., & N. R. Co.*, 44 Iowa, 172; *ante*, p. 417. *Contra*, under statutes of Indiana and Missouri. *Peru & I. R. Co. v. Hasket*, 10 Ind. 409; *Indianapolis, B., & W. R. Co. v. McBrown*, 46 Ind. 229; *Louisville, N. A., & C. R. Co. v. Smith*, 58 Ind. 575; *Baltimore, P., & C. R. Co. v. Thomas*, 60 Ind. 107; *Laferty v. Han. & St. J. R. Co.*, 44 Mo. 291. See *ante*, Chap. XII. p. 348.

for the benefit of the adjoining land-owner, may be waived by him, and the effect of such waiver is to relieve it of liability for injuries to cattle resulting from its omission to comply with the statute. It will, however, notwithstanding the waiver, remain liable for an intentional injury, or even, in some jurisdictions, for negligence only.¹ The owner's agreement to maintain the fences or gates is such a waiver,² and it binds his tenant as well as himself.³

Whether the waiver by the owner of the company's duty to maintain a fence will affect persons not in privity with him whose cattle stray upon his land, and thence enter on the track, depends upon the different constructions, already considered, which are put on the policy and intent of the legislation requiring the company to maintain fences.⁴ If the company is compelled to pay such parties for cattle, caused by the want of a fence, it is held entitled to indemnity from the land-owner who agreed to maintain the fence.⁵ The waiver is not affected by the company's breach of its agreement to furnish some other protection equivalent to that provided by statute, the owner's remedy for such breach being an action for damages upon the contract.⁶

The intent to waive the benefit of the statute must clearly appear from the terms of the agreement.⁷ The waiver will not be

¹ *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116; *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150, 156, 157; *Enright v. San Francisco & S. J. R. Co.*, 33 Cal. 230; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Tyson v. K. & D. M. R. Co.*, 43 Iowa, 207.

² *Tombs v. Rochester & S. R. Co.*, 18 Barb. 583; *Talmadge v. Rensselaer & S. R. Co.*, 13 Barb. 493; *Terre Haute & R. R. Co. v. Smith*, 16 Ind. 102; *Indianapolis, P., & C. R. Co. v. Petty*, 25 Ind. 413; *Fort Wayne, M., & C. R. Co. v. Mussetter*, 48 Ind. 286; *Cincinnati, H., & I. R. Co. v. Ridge*, 54 Ind. 39; *Baltimore P. & C. R. Co. v. Johnson*, 59 Ind. 188; *Cincinnati, H., & D. R. Co. v. Waterson*, 4 Ohio St. 424, 434; *Pittsburg, C., & St. L. R. Co. v. Smith*, 26 Ohio St. 124; *Eames v. Worcester & N. R. Co.*, 105 Mass. 193. See *New Albany & S. R. Co. v. Maiden*, 12 Ind. 10; *Poler v. New York Cent. R. Co.*, 16 N. Y. 476; *Shepard v. Buffalo, N. Y., & E. R. Co.*, 35 N. Y. 641.

³ *Indianapolis, P., & C. R. Co. v.*

Shimer, 17 Ind. 295; *Indianapolis, P., & C. R. Co. v. Petty*, 25 Ind. 413; *Duffy v. New York & H. R. Co.*, 2 Hilton, 496.

⁴ *Jeffersonville, M., & I. R. Co. v. Nichols*, 30 Ind. 321; *Cincinnati, H., & I. R. Co. v. Ridge*, 54 Ind. 39; *Gill v. Atlantic & G. W. R. Co.*, 27 Ohio St. 240; *Warren v. K. & D. M. R. Co.*, 41 Iowa, 484; *Gilman v. European & N. A. R. Co.*, 60 Me. 235; *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Shepard v. Buffalo, N. Y., & E. R. Co.*, 35 N. Y. 641; *ante*, pp. 412-416.

⁵ *Warren v. K. & D. M. R. Co.*, 41 Iowa, 484.

⁶ *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116; *Drake v. Phil. & E. R. Co.*, 51 Pa. St. 240. See *Lawton v. Fitchburg R. Co.*, 8 Cush. 230.

⁷ *White v. Concord R. Co.*, 30 N. H. 188; *Cleveland, C. C., & I. R. Co. v. Crossley*, 36 Ind. 370; *Shepard v. Buffalo, N. Y., & E. R. Co.*, 35 N. Y. 641.

inferred from a conveyance in fee-simple of a right of way to the company, without reservation or exception;¹ or from the land-owner's voluntary erection and maintenance of the fence;² or from his building it for the company under a contract.³ The company's written contract to build a fence with crossings does not relieve it of its statute duty to provide at such crossings gates or bars which were not mentioned in the contract.⁴ The company is not relieved of its duty to fence as imposed by statute, by the fact that the jury or appraising body allowed the land-owner compensation for fencing.⁵

Duty to fence assumed by the Company.—The company having assumed by an agreement with the land-owner the obligation, although not imposed by statute, to maintain fences, gates, or cattle passes, cannot relieve itself therefrom by subsequent proceedings for taking land.⁶ It does not, by building a fence of its own accord, thereby agree to maintain it.⁷

Agreements to maintain Fences when running with the Land.—Parol promises to maintain fences do not run with the land, and affect only the parties to them.⁸ But a written agreement, where the intent to charge the land appears, runs with it, and may be enforced by and against subsequent grantees.⁹ An agreement recited in a record of proceedings for condemnation, that the company is to maintain the fence, runs with the land.¹⁰

¹ *Smith v. New York & O. M. R. Co.*, 63 N. Y. 58.

² *Jeffersonville, M., & I. R. Co. v. Sullivan*, 38 Ind. 262; *Fort Wayne, M., & C. R. Co. v. Mussetter*, 48 Ind. 286. See *Jeffersonville, M., & I. R. Co. v. Nichols*, 30 Ind. 321.

³ *Illinois Cent. R. Co. v. Swearingen*, 33 Ill. 289, 47 Ill. 206.

⁴ *Poler v. New York Cent. R. Co.*, 16 N. Y. 476.

⁵ *Baltimore, P., & C. R. Co. v. Johnson*, 59 Ind. 188. See *Terre Haute & R. R. Co. v. Smith*, 16 Ind. 102; *Rockford, R. I., & St. L. R. Co. v. Lynch*, 67 Ill. 149; *Morss v. Boston & M. R.*, 2 Cush. 536.

⁶ *Gray v. Burlington & M. R. Co.*, 37 Iowa, 119.

⁷ *Morss v. Boston & M. R.*, 2 Cush. 536; *Waldron v. Portland, S., & P. R. Co.*, 35 Me. 422.

⁸ *Morss v. Boston & M. R.*, 2 Cush. 536; *Wilder v. Maine Cent. R. Co.*, 65 Me. 332; *St. Louis, A., & T. H. R. Co. v. Todd*, 36 Ill. 409; *Vandegrift v. Delaware R. Co.*, 2 Houst. 287. See *Pitkin v. Long Island R. Co.*, 2 Barb. Ch. 221; *Day v. New York Cent. R. Co.*, 31 Barb. 548, 53 Barb. 250.

⁹ *Easter v. Little Miami R. Co.*, 14 Ohio St. 48; *Gill v. Atlantic & G. W. R. Co.*, 27 Ohio St. 240, 250; *Cook v. Mil. & St. P. R. Co.*, 36 Wis. 45; *Duffy v. New York & H. R. Co.*, 2 Hilton, 496; *Bronson v. Coffin*, 108 Mass. 175. See *ante*, Chap. VI. p. 135.

¹⁰ *Huston v. Cincinnati & Z. R. Co.*, 21 Ohio St. 235.

Remedy for Breach of the Agreement. Damages. — The remedy for an injury resulting from a breach of the agreement to maintain a fence is an action of contract upon the agreement, and not an action of tort.¹

Different rules for the measure of damages for a breach of the agreement have been stated, — as the cost of erecting the fence,² the value of the crop destroyed in consequence of the failure to maintain them,³ or the injury to the use and enjoyment of the land.⁴ The damages suffered before the commencement of the action, and not prospective damages, may be recovered.⁵ The erection of fences by the company, after the action is brought, does not affect the plaintiff's right to recover.⁶

Plaintiff's Negligence. — Where the company, not being in default under statutes in relation to the maintenance of fences, has, by the negligent management of its engines, injured cattle coming upon its track, the contributory negligence of the plaintiff will defeat the action.⁷

Such contributory negligence of the owner may consist in his allowing his cattle to stray in the vicinity of the railroad.⁸ Their escape from a well-fenced field, when involuntary on his part, and followed by reasonable efforts to reclaim them, is not negligence.⁹ Even if the company is in default, it is his duty to

¹ *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116; *Drake v. Phil. & E. R. Co.*, 51 Pa. St. 240; *Vandergrift v. Delaware R. Co.*, 2 Houst. 287. See *Fernow v. Dubuque & S. W. R. Co.*, 22 Iowa, 528.

² *Lawton v. Fitchburg R. Co.*, 8 Cush. 230.

³ *Chicago & R. I. R. Co. v. Ward*, 16 Ill. 522 (qualified by *Chicago v. Huennerbein*, 85 Ill. 594); *Smith v. Chicago, C., & D. R. Co.*, 38 Iowa, 518.

⁴ *Huston v. Cincinnati & Z. R. Co.*, 21 Ohio St. 235.

⁵ *Phelps v. New Haven & N. R. Co.*, 43 Conn. 453; *Huston v. Cincinnati & Z. R. Co.*, 21 Ohio St. 235.

⁶ *Lawton v. Fitchburg R. Co.*, 8 Cush. 230.

⁷ *Illinois Cent. R. Co. v. Goodwin*, 30 Ill. 117; *Ohio & M. R. Co. v. Eaves*, 42 Ill. 288; *Chicago & N. W. R. Co. v. Goss*, 17 Wis. 428; *Fisher v. Farmers' Loan & T. Co.*, 21 Wis. 73; *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665; *Flint & P.*

M. R. Co. v. Lull, 28 Mich. 510; *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397; *Toledo & W. R. Co. v. Thomas*, 18 Ind. 215; *Jeffersonville, M., & I. R. Co. v. Foster*, 63 Ind. 342.

⁸ *Indianapolis, C., & L. R. Co. v. Harter*, 38 Ind. 557; *Jeffersonville, M., & I. R. Co. v. Adams*, 43 Ind. 402; *Jeffersonville, M., & I. R. Co. v. Underhill*, 48 Ind. 389, 40 Ind. 229; *Cincinnati, H., & D. R. Co. v. Street*, 50 Ind. 225; *Detroit, E. R., & I. R. Co. v. Barton*, 61 Ind. 293; *Marsh v. New York & E. R. Co.*, 14 Barb. 364; *Halloran v. New York & H. R. Co.*, 2 E. D. Smith, 257; *Bowman v. Troy & B. R. Co.*, 37 Barb. 516; *Smith v. Chicago, R. I., & P. R. Co.*, 34 Iowa, 506; *Kuhn v. Chicago, R. I., & P. R. Co.*, 42 Iowa, 420; *Pitzner v. Shinnick*, 39 Wis. 129; *Bennett v. Chicago & N. W. R. Co.*, 19 Wis. 145; *Galpin v. Chicago & N. W. R. Co.*, 19 Wis. 604.

⁹ *Chicago & N. W. R. Co. v. Harris*, 54 Ill. 528; *Toledo, P., & W. R. Co. v.*

use ordinary care to save his property from being injured thereby.¹

Where the company is in default as to the maintenance of fences, and through such default cattle enter on its track at places where it has failed to maintain the fence, and are killed by its engines, the authorities are in conflict as to the effect of the owner's conduct upon his right of action. On the one hand, it has been held that he cannot recover if by his negligence he substantially contributed to the injury, as by turning his cattle into the unfenced field adjoining the railroad with knowledge of its condition;² but, on the other, it has been considered that when the company has failed to perform its statute duty, and thereby injury has occurred, the owner's conduct will defeat his action only in the case of a positive act exposing his property, or negligence of a kind which shows a willingness to sacrifice it. According to this view he is not in such default as to disentitle him to maintain an action when the company having failed to perform its duty, he merely allows his cattle to stray in the vicinity of the railroad,³ or puts them into his field, between which and the track the company has failed to maintain a fence as required by statute.⁴

Where the owner and the company are under equal obligations

Johnston, 74 Ill. 83; Peoria, P., & J. R. Co. v. Champ, 75 Ill. 577; Chicago & N. W. R. Co. v. Goss, 17 Wis. 428; Bennett v. Chicago & N. W. R. Co., 19 Wis. 145, 148; Bulkley v. New York & N. H. R. Co., 27 Conn. 479; Pearson v. Mil. & St. P. R. Co., 45 Iowa, 497.

¹ Downing v. Chicago, R. I., & P. R. Co., 43 Iowa, 96; Finch v. Central R., 42 Iowa, 304; Smith v. Chicago, C., & D. R. Co., 38 Iowa, 518; Illinois Cent. R. Co. v. Finnigan, 21 Ill. 646.

² Curry v. Chicago & N. W. R. Co., 43 Wis. 665 (reviewing Jones v. Sheboygan & F. R. Co., 42 Wis. 306; Lawrence v. Mil., L. S., & W. R. Co., 42 Wis. 322); Baltimore & O. R. Co. v. Lamborn, 12 Md. 257; Keech v. Balt. & W. R. Co., 17 Md. 32; Eames v. Salem & L. R. Co., 98 Mass. 560; Joliet & N. I. R. Co. v. Jones, 20 Ill. 221; Gribble v. Sioux City, 38 Iowa, 390.

³ Corwin v. New York & E. R. Co., 13 N. Y. 42, 49; Munch v. New York Cent.

R. Co., 29 Barb. 647; Brady v. Rensselaer & S. R. Co., 1 Hun, 378, 3 Thomp. & C. 537; Flint & P. M. R. Co. v. Lull, 28 Mich. 510; Knight v. Toledo & W. R. Co., 24 Ind. 402; Jeffersonville, M., & I. R. Co. v. Dunlap, 29 Ind. 426; Bellefontaine R. Co. v. Reed, 33 Ind. 476; Jeffersonville, M., & I. R. Co. v. Ross, 37 Ind. 545; Louisville, N. A., & C. R. Co. v. Cahill, 63 Ind. 340; Louisville, N. A., & C. R. Co. v. Whitesell, 68 Ind. 297; St. Louis, A., & T. H. R. Co. v. Todd, 36 Ill. 409; Toledo, W., & W. R. Co. v. Furgusson, 42 Ill. 449; Ohio & M. R. Co. v. Fowler, 85 Ill. 21.

⁴ Poler v. New York Cent. R. Co., 16 N. Y. 476; Shepard v. Buffalo, N. Y., & E. R. Co., 35 N. Y. 641; Rogers v. Newburyport R. Co., 1 Allen, 16; Wilder v. Maine Cent. R. Co., 65 Me. 332; McCoy v. Cal. Pacific R. Co., 40 Cal. 532; Toledo, W., & W. R. Co. v. Carey, 37 Ind. 172.

to maintain a division fence, the owner's default in maintaining it will be a defence to an action against the company for an injury to his cattle coming upon the track for want of a fence, where the company, though neglecting to maintain one, is not chargeable with negligence in running its train.¹

Letting cattle run at large in violation of a statute will defeat the action where the company's only default is its failure to fence its track as required by statute.² But some authorities allow the owner's illegal act to be a defence only when injury to the cattle would, under the circumstances, be the natural and probable consequence of letting them go at large,³ or the owner's act was a wilful exposure of his property.⁴

Where a land-owner, without notifying the company of a defect in the fence which it is bound to maintain, undertakes as a volunteer to repair it, and leaves it imperfect, he is chargeable with negligence, which will prevent his recovery for an injury resulting from its defective condition.⁵ If he makes a change in the fence for his own convenience, he assumes the responsibility for injuries caused thereby.⁶

Negligence, a Question for the Jury.—Where negligence is the gist of the action against the company for an injury to cattle, the question whether the company used ordinary care or is chargeable with negligence is for the jury.⁷ Whether the plaintiff is chargeable with contributory negligence is for the jury.⁸

¹ Sandusky & C. R. Co. v. Sloan, 27 Ohio St. 341; Dayton & M. R. Co. v. Miami County Infirmary, 32 Ohio St. 566.

² Pittsburg, Ft. W., & C. R. Co. v. Methven, 21 Ohio St. 586; Perkins v. Eastern R. Co., 29 Me. 307; Pitzner v. Shinnick, 39 Wis. 129; Central Branch R. Co. v. Lea, 20 Kan. 353 (modifying Hopkins v. Kansas Pacific R. Co., 18 Kan. 462); Atchison, T., & S. F. R. Co. v. Hegwir, 21 Kan. 622; Peoria, P., & J. R. Co. v. Champ, 75 Ill. 577; Denver & R. G. R. Co. v. Olsen, 4 Col. 239. If the cattle stray without the owner's fault, the statute has been held not to apply. Pearson v. Mil. & St. P. R. Co., 45 Iowa, 497.

³ Ewing v. Chicago & A. R. Co., 72 Ill. 25; Rockford, R. I., & St. L. R. Co. v. Irish, 72 Ill. 404; Cairo & St. L. R. Co. v. Murray, 82 Ill. 76; Cairo & St. L. R.

Co. v. Woosley, 85 Ill. 370; Cincinnati, L., & C. R. Co. v. Ducharme, 4 Brad. (Ill.) 178; Lafayette & I. R. Co. v. Shriener, 6 Ind. 141.

⁴ Spence v. Chicago & N. W. R. Co., 25 Iowa, 139; Stewart v. Chicago & N. W. R. Co., 27 Iowa, 282; Stewart v. Burlington & M. R. Co., 32 Iowa, 561; Fritz v. Mil. & St. P. R. Co., 34 Iowa, 337.

⁵ Chicago, B., & Q. R. Co. v. Seirer, 60 Ill. 295.

⁶ Koutz v. Toledo, W., & W. R. Co., 54 Ind. 515.

⁷ Morse v. Rutland & B. R. Co., 27 Vt. 49; Beers v. Housatonic R. Co., 19 Conn. 566; Morrison v. New York & N. H. R. Co., 32 Barb. 568; Central Ohio R. Co. v. Lawrence, 13 Ohio St. 66; Hannibal & St. J. R. Co. v. Kenney, 41 Mo. 271.

⁸ Estes v. Atlantic & St. L. R. Co., 63 Me. 308; Rockford, R. I., & St. L. R. Co. v.

Burden of Proof. Evidence.—The burden of proof is on the plaintiff to show the company's negligence whenever its liability for an injury to his cattle depends on its negligence, as when the cattle entered on the track at a place where the company is not required to maintain a fence; and the injury itself, though inflicted by the company, is not *prima facie* evidence of its negligence.¹

If the company is in default in the performance of a legal obligation, as by neglect to maintain the fence at the place where the cattle came on the track, proof of such default and of the cattle coming upon the track at such a place will maintain the action; but such proof is essential.² If the animal is killed at a

Irish, 72 Ill. 404; Cairo & St. L. R. Co. v. Woosley, 85 Ill. 370; Cincinnati, L., & C. R. Co. v. Ducharme, 4 Brad. (Ill.) 178; Pitzner v. Shinnick, 39 Wis. 129; Curry v. Chicago & N. W. R. Co., 43 Wis. 665; Hammond v. S. C. & P. R. Co., 49 Iowa, 450.

¹ Lyndsay v. Conn. & P. R. R. Co., 27 Vt. 643; Waldron v. Portland, S., & P. R. Co., 35 Me. 422; Terry v. New York Cent. R. Co., 22 Barb. 574; Illinois Cent. R. Co. v. Reedy, 17 Ill. 580; Galena & C. U. R. Co. v. Crawford, 25 Ill. 529; Great Western R. Co. v. Morthland, 30 Ill. 451; Chicago & A. R. Co. v. Utley, 38 Ill. 410; Illinois Cent. R. Co. v. Whalen, 42 Ill. 396; Rockford, R. I., & St. L. R. Co. v. Connell, 67 Ill. 216; Peoria, P., & J. R. Co. v. Barton, 80 Ill. 72; Chicago, B., & Q. R. Co. v. Farrelly, 3 Brad. (Ill.) 60; Indianapolis & C. R. Co. v. Means, 14 Ind. 30; Cincinnati, H., & I. R. Co. v. Bartlett, 58 Ind. 572; Indianapolis, P., & C. R. Co. v. Caudle, 60 Ind. 112; Plaster v. Ill. Cent. R. Co., 35 Iowa, 449; Schneir v. Chicago, R. I., & P. R. Co., 40 Iowa, 337; Lawrence v. Mil., L. S., & W. R. Co., 42 Wis. 322; Bethje v. Houston & C. T. R. Co., 26 Tex. 604; Walsh v. Va. & T. R. Co., 8 Nev. 110; Scott v. Wil. & R. R. Co., 4 Jones (N. C.), 432; Doggett v. Richmond & D. R. Co., 81 N. C. 459; Locke v. St. Paul & P. R. Co., 15 Minn. 350; Grand Rapids & I. R. Co. v. Judson, 34 Mich. 506; New Orleans, J., & G. N. R. Co. v. Enochs, 42 Miss. 603. *Contra*, Danner v. So. Car. R. Co., 4 Rich. 329; Wilson v. Wil. & M. R. Co., 10 Rich. 52; Murray v. So. Car. R. Co., 10 Rich.

227; Roof v. Charlotte, C., & A. R. Co., 4 So. Car. N. S. 61; White v. Concord R. Co., 30 N. H. 188; Smith v. Eastern R. Co., 35 N. H. 356; Woolfolk v. Macon & A. R. Co., 56 Ga. 457. In some States, by statute, the injury is made *prima facie* evidence of the company's negligence. Louisville & N. R. Co. v. Brown, 13 Bush, 475; Kentucky Cent. R. Co. v. Lebus, 14 Bush, 518; Atlantic & G. R. Co. v. Griffin, 61 Ga. 11; Keech v. Balt. & W. R. Co., 17 Md. 32; Mobile & O. R. Co. v. Williams, 53 Ala. 595; Memphis & C. R. Co. v. Smith, 9 Heisk. 860; L. R. & F. S. R. Co. v. Payne, 33 Ark. 816. Statutes imposing liability in general terms on the company for cattle killed have been held to impose only a *prima facie* liability, from which it can relieve itself by proof of proper care. L. R. & F. S. R. Co. v. Payne, 33 Ark. 816. See Mobile & O. R. Co. v. Williams, 53 Ala. 595.

² Galena & C. U. R. Co. v. Crawford, 25 Ill. 529; Chicago & A. R. Co. v. Utley, 38 Ill. 410; Toledo, P., & W. R. Co. v. Wickery, 44 Ill. 76; Chicago & N. W. R. Co. v. Barrie, 55 Ill. 226; Rockford, R. I., & St. L. R. Co. v. Lynch, 67 Ill. 149; McCoy v. Cal. Pacific R. Co., 40 Cal. 582; Indianapolis & C. R. Co. v. Means, 14 Ind. 30; Bellefontaine R. Co. v. Suman, 29 Ind. 40; Bennett v. Chicago & N. W. R. Co., 19 Wis. 145; Lawrence v. Mil., L. S., & W. R. Co., 42 Wis. 322; Cecil v. Pacific R. Co., 47 Mo. 246; Lantz v. St. Louis, K. C., & N. R. Co., 54 Mo. 228; Small v. Chicago, R. I., & P. R. Co., 50 Iowa, 338, 341.

place where the company has failed to fence, the jury may infer that the cattle entered there.¹

Where the cause of action depends upon the company's failure to fence as required by statute, the plaintiff must show that the cattle went upon the track at a place where it was required to fence.² Its failure to fence at other places than the one where they entered, or its negligence at other times, is immaterial.³ Evidence of the condition of the fence two or three days after the injury has been admitted.⁴ Where the fence was generally insecure, proof of the particular place where the cattle entered was dispensed with.⁵

Proof that cattle were killed when the train was running at a prohibited speed is *prima facie* evidence of negligence;⁶ but the fact of injury to cattle does not show that the speed was unlawful.⁷

Proof of an omission of signals required by statute and of the fact of injury does not show a cause of action, but there must be proof that the injury resulted from the omission.⁸ Where the statute makes the fact of killing cattle *prima facie* evidence of negligence, the company is not responsible, if it appears by the evidence of the facts as fully disclosed that it used all proper precautions to prevent injury.⁹

The burden of showing the plaintiff's contributory negligence is on the company, where it has failed to maintain the fence as required by law;¹⁰ but if the company is not in default, under the statute, the burden is on the plaintiff to show that he did not by his want of ordinary care contribute to the injury.¹¹ Where bars

¹ St. Louis & S. E. R. Co. v. Casner, 72 Ill. 384; Toledo, P., & W. R. Co. v. Pence, 68 Ill. 524; Fickle v. St. Louis, K. C., & N. R. Co., 54 Mo. 219; Walther v. Pacific R. Co., 55 Mo. 271.

² Cecil v. Pacific R. Co., 47 Mo. 246; Morrison v. New York & N. H. R. Co., 32 Barb. 568; Lawrence v. Mil., L. S., & W. R. Co., 42 Wis. 322.

³ Brooks v. New York & E. R. Co., 13 Barb. 594; Great Western R. Co. v. Morthland, 30 Ill. 451; Chicago, B., & Q. R. Co. v. Farrelly, 3 Brad. (Ill.) 60; Miss. Cent. R. Co. v. Miller, 40 Miss. 45; Cecil v. Pacific R. Co., 47 Mo. 246.

⁴ Mackie v. Central R. Co., 6 Northwest. Rep. 723.

⁵ Louisville, N. A., & C. R. Co. v. Spain, 61 Ind. 460.

⁶ Chicago & A. R. Co. v. Engle, 58 Ill. 381; Toledo, P., & W. R. Co. v. Deacon, 63 Ill. 91.

⁷ Chicago & A. R. Co. v. Engle, 58 Ill. 381.

⁸ Galena & C. U. R. Co. v. Loomis, 13 Ill. 548; Stoneman v. Atlantic & P. R. Co., 58 Mo. 503; Holman v. Chicago, R. I., & P. R. Co., 62 Mo. 562; *ante*, p. 408.

⁹ Durham v. Wil. & W. R. Co., 82 N. C. 352.

¹⁰ Rogers v. Newburyport R. Co., 1 Allen, 16; Cairo & St. L. R. Co. v. Woosley, 85 Ill. 370.

¹¹ Waldron v. Portland, S., & P. R. Co., 35 Me. 422; Jeffersonville, M., & I. R. Co.

are left for the convenience of the owner, and cattle escape because of their being down, the burden of proof is on him to show that they were down without his fault.¹ The company's failure to fence is not to be presumed.² Possession of stock is *prima facie* evidence of ownership.³

Whether a company is bound to fence at a particular place is a question of law.⁴ An action for an injury to cattle, depending on the company's common-law liability, is transitory.⁵ The measure of damages for the killing of cattle caused by the company's default is their value.⁶

v. Huber, 42 Ind. 173; *Indianapolis, P., & C. R. Co. v. Caudle*, 60 Ind. 112.

¹ *Waldron v. Portland, S. & P. R. Co.*, 35 Me. 422; *Eames v. Boston & W. R. Co.*, 14 Allen, 151.

² *Indianapolis & C. R. Co. v. Wharton*, 13 Ind. 509.

³ *Toledo, W., & W. R. Co. v. Stevens*, 63 Ind. 337.

⁴ *Illinois Cent. R. Co. v. Whalen*, 42 Ill. 396.

⁵ *Toledo, W., & W. R. Co. v. Milligan*, 52 Ind. 505.

⁶ *Toledo, P., & W. R. Co. v. Arnold*, 43 Ill. 418.

CHAPTER XVI.

INJURIES TO PROPERTY BY FIRE.

Liability at Common Law.—An individual may for a lawful purpose kindle a fire upon his land, and, if he exercises his right reasonably and with due precautions, he is not liable for injury caused by the fire being communicated to the property of others; but he becomes liable if the injury results from the negligent, unskilful, and improper exercise of his right.¹ He is liable for such injuries by his negligence, whether the fire is communicated through the air or along the ground.²

A railroad company being authorized by law to work its engines in the usual and proper way, and when necessary, in the exercise of this right, to send forth particles of fire from them, is not liable for injuries caused thereby to private property, provided it exercises its right in a lawful manner and with reasonable care and skill.³ It may use ordinary materials for fuel, as

¹ *Clark v. Foot*, 8 Johns. 421; *Stuart v. Hawley*, 22 Barb. 619; *Teall v. Barton*, 40 Barb. 137; *Calkins v. Barger*, 44 Barb. 424; *Webb v. Rome, W., & O. R. Co.*, 49 N. Y. 420, 3 Lans. 453; *Losee v. Buchanan*, 51 N. Y. 476, 487; *Hays v. Miller*, 6 Hun, 320; *Bachelor v. Heagan*, 18 Me. 32; *Hewey v. Nourse*, 54 Me. 256; *Perley v. Eastern R. Co.*, 98 Mass. 414, 418; *Higgins v. Dewey*, 107 Mass. 494; *McCully v. Clarke*, 40 Pa. St. 399; *Hanlon v. Ingram*, 3 Iowa, 81; *Cleland v. Thornton*, 43 Cal. 437; *Gagg v. Vetter*, 41 Ind. 228; *Pittsburg, C., & St. L. R. Co. v. Culver*, 60 Ind. 469; *Read v. Morse*, 34 Wis. 315; *Vaughan v. Menlove*, 3 Bing. N. R. 468; *Filliter v. Phippard*, 11 Q. B. 347.

² *Higgins v. Dewey*, 107 Mass. 494.

³ *Burroughs v. Housatonic R. Co.*, 15 Conn. 124; *Chapman v. Atlantic & St. L. R. Co.*, 37 Me. 92; *Phil. & R. R. Co.*

v. Yeiser, 8 Pa. St. 366; *Frankford & B. Turn. Co. v. Phil. & T. R. Co.*, 54 Pa. St. 345; *Phil. & R. R. Co. v. Yerger*, 73 Pa. St. 121; *Erie R. Co. v. Decker*, 78 Pa. St. 293; *Phil. & R. R. Co. v. Hendrickson*, 80 Pa. St. 182; *Phil. & R. R. Co. v. Schultz*, 37 Leg. Int. 386; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, 29 Barb. 226; *Collins v. New York Cent. & H. R. R. Co.*, 5 Hun, 503; *Rood v. New York & E. R. Co.*, 18 Barb. 80; *Morris & E. R. Co. v. State*, 7 Vroom, 553; *Jefferis v. Phil., W., & B. R. Co.*, 3 Houst. 447; *Illinois Cent. R. Co. v. Mills*, 42 Ill. 407; *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389; *Toledo, W., & W. R. Co. v. Larmon*, 67 Ill. 68; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448; *Louisville, N. A., & C. R. Co. v. Richardson*, 66 Ind. 43; *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa, 420; *Kansas Pacific R. Co. v. Butts*, 7 Kan. 308; *Missouri, K., & T. R. Co. v. Davidson*, 14

wood and coal of different kinds, availing itself of the appropriate mechanical contrivances best adapted to diminish the chances of communicating fire.¹ But the company is bound to use ordinary care and to take reasonable precautions in the construction, equipment, and use of its machines, to prevent injury to private property from such issuing of particles of fire; and this care must be proportionate to the danger arising from its peculiar machinery and methods.² Its mode of driving its engines need not, however, vary with the dryness of the weather or the nearness of combustible materials belonging to private owners.³ It is liable for the negligent burning of buildings which it has allowed private persons to build within its location;⁴ and, like other proprietors, for injuries by fire negligently communicated from the chimneys of its buildings,⁵ or from weeds and grass within its location to which it has set fire.⁶ When working its engines without lawful authority it is liable for injuries by fire, even when not negligent in their management.⁷

Compensation for Land taken not to include Injuries by Fire caused by Negligence. — The special remedy under which compensation for land taken is assessed does not exclude actions for injuries by fire caused by the company's negligence, as the compensation is fixed on the basis of the company's using due care in the exercise of its powers.⁸ Nor is parol evidence admissible to show that

Kan. 349; *Leavenworth, L., & G. R. Co. v. Cook*, 18 Kan. 261; *Vaughan v. Taff Vale R. Co.*, 5 Hurl. & N. 679, 3 Hurl. & N. 743; *Smith v. London & S. W. R. Co.*, L. R. 6 C. P. 14, L. R. 5 C. P. 98; *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. 171, L. R. 1 Q. B. 130, L. R. 2 Q. B. 223, 7 Best & S. 1; *Fremantle v. London & N. W. R. Co.*, 2 Fost. & F. 337, 10 C. B. n. s. 89; *Rex v. Pease*, 4 B. & Ad. 30.

¹ *Collins v. New York Cent. & H. R. R. Co.*, 5 Hun, 499; *Lackawanna & B. R. Co. v. Doak*, 52 Pa. St. 379; *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242.

² *Smith v. Old Colony & N. R. Co.*, 10 R. I. 22; *Frankford & B. T. Co. v. Phil. & T. R. Co.*, 54 Pa. St. 345; *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209; *Jackson v. Chicago & N. W. R. Co.*, 31 Iowa, 176; *Ward v. Mil. & S. P. R. Co.*, 29 Wis. 144; *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110; *Read v. Morse*, 34 Wis. 315; *Longabaugh v. Virginia*

City & T. R. Co., 9 Nev. 271; *Snyder v. Pittsburg, C., & St. L. R. Co.*, 11 W. Va. 14, 36; *Illinois Cent. R. Co. v. Mills*, 42 Ill. 407.

³ *Michigan Cent. R. Co. v. Anderson*, 20 Mich. 244. But see *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209; *Webb v. Rome, W., & O. R. Co.*, 49 N. Y. 420, 3 Lans. 453; *Frankford & B. T. Co. v. Phil. & T. R. Co.*, 54 Pa. St. 345; *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 469, 470.

⁴ *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Ingersoll v. Stockbridge & P. R. Co.*, 8 Allen, 438.

⁵ *Briggs v. New York Cent. & H. R. R. Co.*, 72 N. Y. 26.

⁶ *Ohio & M. R. Co. v. Porter*, 92 Ill. 437.

⁷ *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733;

⁸ *Huyett v. Phil. & R. R. Co.*, 23 Pa.

the jury took into consideration the risk of fires negligently caused by the company.¹ Exposure to injuries by fire not caused by the company's negligence is presumed to have been taken into account as part of the land-owner's damages.² To what extent the increased risk by fire can be regarded in fixing such compensation has been elsewhere considered.³

Duty as to Mechanical Contrivances. Spark Arresters.—The duty of the company to use reasonable care in order to avoid injury resulting to others from the exercise of its powers requires it to avail itself of the best mechanical contrivances and inventions in known practical use which are effective in preventing the burning of private property by the escape of sparks and coals from its engines; and it is liable for injuries caused by its omission to use them. Its duty in this respect is limited to such contrivances as have been already tested and put in use, and it is not required to use every possible contrivance, although already patented and recommended in scientific discussions.⁴

St. 373; *Sunbury & E. R. Co. v. Hummell*, 27 Pa. St. 99; *Lehigh Valley R. Co. v. Lazarus*, 28 Pa. St. 203; *Delaware, L., & W. R. Co. v. Salmon*, 10 Vroom, 299, 9 Vroom, 5; *ante*, Chap. VII. p. 179, Chap. X. p. 262.

¹ *Caswell v. Chicago & N. W. R. Co.*, 42 Wis. 193; *Pierce v. Worcester & N. R. Co.*, 105 Mass. 199.

² *Small v. Chicago, R. I., & P. R. Co.*, 50 Iowa, 338; *Phil. & R. R. Co. v. Yeiser*, 8 Pa. St. 366, 376.

³ *Ante*, Chap. VII. p. 215.

⁴ *Cook v. Champlain Trans. Co.*, 1 Denio, 91, 102; *Steinweg v. Erie R. Co.*, 43 N. Y. 123; *Bedell v. Long Island R. Co.*, 44 N. Y. 367; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Webb v. Rome, W., & O. R. Co.*, 49 N. Y. 420, 3 Lans. 453; *Crist v. Erie R. Co.*, 58 N. Y. 638, 1 Thomp. & C. 435; *Bevier v. Del. & H. C. Co.*, 13 Hun, 254; *Lackawanna & B. R. Co. v. Doak*, 52 Pa. St. 379; *Frankford & B. T. Co. v. Phil. & T. R. Co.*, 54 Pa. St. 345; *Phil. & R. R. Co. v. Yerger*, 73 Pa. St. 121; *Bass v. Chicago, B., & Q. R. Co.*, 28 Ill. 9; *St. Louis, A., & T. H. R. Co. v. Gilham*, 39 Ill. 455; *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355;

Illinois Cent. R. Co. v. Mills, 42 Ill. 407; *Ohio & M. R. Co. v. Shanefelt*, 47 Ill. 497; *Toledo, P., & W. R. Co. v. Pindar*, 53 Ill. 447; *Chicago & N. W. R. Co. v. McCahill*, 56 Ill. 28; *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389; *Toledo, W., & W. R. Co. v. Corn*, 71 Ill. 493; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448; *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143; *Gagg v. Vetter*, 41 Ind. 228; *Toledo, W., & W. R. Co. v. Wand*, 48 Ind. 476; *Pittsburg, C., & St. L. R. Co. v. Nelson*, 51 Ind. 150; *Jackson v. Chicago & N. W. R. Co.*, 31 Iowa, 176; *Read v. Morse*, 34 Wis. 315; *Delaware, L., & W. R. Co. v. Salmon*, 10 Vroom, 299, 9 Vroom, 5; *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242; *Fitch v. Pacific R. Co.*, 45 Mo. 322; *Hoyt v. Jeffers*, 30 Mich. 181, 193; *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271, 293; *Anderson v. Cape Fear Steamboat Co.*, 64 N. C. 399; *Fremantle v. London & N. W. R. Co.*, 2 Foster & F. 337, 10 C. B. n. s. 89. For cases relating to the duty to use such inventions in the carrying of passengers, see *Hegeman v. Western R. Co.*, 13 N. Y. 9; *Ford v. London & S. W. R. Co.*, 2 Fost. & F. 730.

Whether the Company is bound to watch for Fires and assist in extinguishing them. — The company is not required to keep a patrol along its track to discover and extinguish fires caused without negligence by its engines.¹ It is not under a duty to stop its trains and require the servants employed on them to assist in extinguishing such fires.² It has, however, been maintained that it should detail its force of servants, who are available for the purpose, to extinguish them;³ but whether this legal obligation exists is open to further inquiry.⁴

Duty as to Combustible Materials within the Location. — The leaving of dry grass, weeds, or other combustible materials near the track exposed to the sparks issuing from the engines is not *per se* negligence in the company, but it is admissible as evidence to show negligence; and it is for the jury to determine whether, under the circumstances, to leave them so exposed, either in the natural state or in heaps, is negligence.⁵ The duty to keep the track clear of such materials has sometimes been imposed by statute, and in such case a failure to perform it is negligence.⁶

The Land-owner's Duty as to Combustible Materials on his Land. — The land-owner's leaving of dry weeds and grass on his land, piling of shavings and stacking of hay near the railroad track, though not *per se* negligence, may be evidence of contributory negligence in him, in like manner as such omission by the company to remove similar combustible materials from its track is evidence of its

¹ Baltimore & O. R. Co. v. Shipley, 39 Md. 251; Indianapolis & C. R. Co. v. Paramore, 31 Ind. 143.

² See Rolke v. Chicago & N. W. R. Co., 26 Wis. 537, 539.

³ Bass v. Chicago, B., & Q. R. Co., 28 Ill. 9, 18.

⁴ Kenney v. Han. & St. J. R. Co., 70 Mo. 252, 63 Mo. 99.

⁵ Webb v. Rome, W., & O. R. Co., 49 N. Y. 420, 3 Lans. 453; Illinois Cent. R. Co. v. Mills, 42 Ill. 407; Ohio & M. R. Co. v. Shanefelt, 47 Ill. 497; Illinois Cent. R. Co. v. Nunn, 51 Ill. 78; Rockford, R. I., & St. L. R. Co. v. Rogers, 62 Ill. 346; Illinois Cent. R. Co. v. Frazier, 64 Ill. 28; Toledo, W., & W. R. Co. v. Corn, 71 Ill. 493; Ohio & M. R. Co. v. Porter, 92 Ill. 437; Toledo, W., & W. R. Co. v. Wand,

48 Ind. 476; Pittsburg, C., & St. L. R. Co. v. Nelson, 51 Ind. 150; Keesee v. Chicago & N. W. R. Co., 30 Iowa, 78; Spaulding v. Chicago & N. W. R. Co., 30 Wis. 110, 33 Wis. 582; Kansas Pacific R. Co. v. Butts, 7 Kan. 308; St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47; Flynn v. San Francisco & S. J. R. Co., 40 Cal. 14; Henry v. Southern Pacific R. Co., 50 Cal. 176; Perry v. Southern Pacific R. Co., 50 Cal. 578; Snyder v. Pittsburg, C., & St. L. R. Co., 11 W. Va. 14; Burlington & M. R. Co. v. Westover, 4 Neb. 268; Troxler v. Richmond & D. R. Co., 74 N. C. 377; Smith v. London & S. W. R. Co., L. R. 6 C. P. 145, L. R. 5 C. P. 98.

⁶ Pittsburg, C., & St. L. R. Co. v. Campbell, 86 Ill. 443.

negligence.¹ Some authorities, however, hold that, while the obligation to remove them from its location is on the company, no similar obligation is on the owner to remove them from his premises.² The plaintiff's remote negligence in not removing such materials has been held not to be a defence to the company's proximate negligence in the careless issuing of sparks from its engines.³

Plaintiff's Negligence. — The plaintiff cannot recover for property negligently burned by the company, if his own negligence contributed to the injury.⁴ Thus, he cannot recover where, having knowledge of the fire, he failed to use reasonable efforts to save his property from it.⁵ The plaintiff's remote negligence will not defeat his action if the defendant's negligence is proximate;⁶ but he cannot recover where both his negligence and the defendant's were of the same kind; that is, remote or proximate with each party.

The Land-owner's Exposure of his Property to Risks. — A land-owner's erection and use of a building for ordinary purposes near the track, although it is more exposed to fire than if it were at a greater distance, is not negligence. The company is bound to use ordinary care to prevent injury by fire to buildings, whether

¹ *Ohio & M. R. Co. v. Shanefelt*, 47 Ill. 497; *Illinois Cent. R. Co. v. Frazier*, 47 Ill. 505; *Chicago & N. W. R. Co. v. Simonson*, 54 Ill. 504; *Coates v. Mo., K., & T. R. Co.*, 61 Mo. 38; *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222 (reviewing *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 233, and *Erd v. Chicago & N. W. R. Co.*, 41 Wis. 65); *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47; *Kansas Pacific R. Co. v. Brady*, 17 Kan. 380; *Kesee v. Chicago & N. W. R. Co.*, 30 Iowa, 78; *Garrett v. Chicago & N. W. R. Co.*, 36 Iowa, 121. The owner's duty to remove such materials may not apply to woodland. *Chicago & N. W. R. Co. v. Simonson*, 54 Ill. 504.

² *Delaware, L., & W. R. Co. v. Salmon*, 10 Vroom, 299, 9 Vroom, 5; *Snyder v. Pittsburg, C., & St. L. R. Co.*, 11 W. Va. 14; *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14.

³ *Fitch v. Pacific R. Co.*, 45 Mo. 322;

Lester v. Kansas City, St. J., & C. B. R. Co., 60 Mo. 265; *Phil. & R. R. Co. v. Schultz*, 37 Leg. Int. 386.

⁴ *Ross v. Boston & W. R. Co.*, 6 Allen, 87; *Ward v. Mil. & St. P. R. Co.*, 29 Wis. 144; *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222; *Small v. Chicago, R. I., & P. R. Co.*, 50 Iowa, 338.

⁵ *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355; *Toledo, P., & W. R. Co. v. Pindar*, 53 Ill. 447; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448, 454; *Doggett v. Richmond & D. R. Co.*, 78 N. C. 305; *ante*, Chap. X. pp. 272, 273.

⁶ *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Flynn v. San Francisco & S. J. R. Co.*, 40 Cal. 14; *Fitch v. Pacific R. Co.*, 45 Mo. 322, 327; *Lester v. Kansas City, St. J., & C. B. R. Co.*, 60 Mo. 265; *Doggett v. Richmond & D. R. Co.*, 78 N. C. 305; *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271.

erected before or after the construction of the railroad. The owner, in the lawful use of his property, may expose it to accidental injury from the lawful acts of others, and be without remedy, but he is still entitled to protection against injuries caused by their culpable negligence.¹ Even leaving the roof of a building in an imperfect condition so as to be more exposed to sparks of fire, or the erection of a barn near the track, is not negligence in the owner.²

The owner, however, who erects buildings or places combustible materials near the track takes the additional risk of accidental fires,³ and the company may make a lawful use of its location although such use increases the risk.⁴ It is not negligence for the owner to leave the windows of his building open where such act would not expose his property to injury if the company used proper precautions against the issue of sparks.⁵ He assumes the risk of fires from engines of the company placed by his request on his private tracks, the condition of which is known to him.⁶

Burden of Proof as to Cause of Fire. — The plaintiff must show that the fire originated from the company's engines.⁷ This will appear from proof that there was no other probable cause.⁸ It is not sufficient to show a possibility that the injury was caused by the company;⁹ but the plaintiff's preliminary evidence need not

¹ *Cook v. Champlain Trans. Co.*, 1 Denio, 91; *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 473; *Burke v. Louisville & N. R. Co.*, 7 Heisk. 451, 464; *Toledo, W., & W. R. Co. v. Maxfield*, 72 Ill. 95; *Burlington & M. R. Co. v. Westover*, 4 Neb. 268, 276; *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143; *Caswell v. Chicago & N. W. R. Co.*, 42 Wis. 193.

² *Phil. & R. R. Co. v. Hendrickson*, 80 Pa. St. 182; *Jefferis v. Phil., W., & B. R. Co.*, 3 Houst. 447. But see *Ward v. Mil. & St. P. R. Co.*, 29 Wis. 145.

³ *Phil. & R. R. Co. v. Hendrickson*, 80 Pa. St. 182; *Great Western R. Co. v. Haworth*, 39 Ill. 346; *Toledo, W., & W. R. Co. v. Larmon*, 67 Ill. 68; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448; *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222; *Michigan Cent. R. Co. v. Anderson*, 20

Mich. 244; *Kansas Pacific R. Co. v. Brady*, 17 Kan. 380.

⁴ *Macon & W. R. Co. v. McConnell*, 27 Ga. 481.

⁵ *Louisville, N., A., & C. R. Co. v. Richardson*, 66 Ind. 43.

⁶ *Marquette, T., H., & O. R. Co. v. Spear*, 6 Northwest. Rep. 202.

⁷ *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, 29 Barb. 226; *Fitch v. Pacific R. Co.*, 45 Mo. 322, 326; *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143; *Jefferis v. Phil., W., & B. R. Co.*, 3 Houst. 447; *Burke v. Louisville & N. R. Co.*, 7 Heisk. 451, 462.

⁸ *Field v. New York Cent. R. Co.*, 32 N. Y. 339; *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251.

⁹ *Sheldon v. Hudson River R. Co.*, 29 Barb. 226, 14 N. Y. 218; *Smith v. Han. & St. J. R. Co.*, 37 Mo. 287, 295; *Longbaugh v. Virginia City & T. R. Co.*, 9 Nev. 271, 296.

exclude the possibility of any other origin of the fire.¹ It is not necessary for him to identify the particular engine which caused the injury.² A person engaged in working upon the company's engine may be presumed to be its servant.³ The proof that the company caused the fire may be circumstantial as well as direct.⁴

Burden of Proof as to Negligence.—As negligence is the gist of the action against the company for injuries received from it while exercising its lawful right to conduct its trains, the burden of proof is on the plaintiff to prove the negligence. The fact of injury suffered by the plaintiff in consequence of the exercise of a right by the defendant does not raise the presumption of negligence, except in some peculiar cases, as in actions against innkeepers and common carriers, which are made exceptions to the general rule on grounds of public policy. Hence the setting on fire of grass, fences, or buildings of land-owners on the railroad by particles of fire, which are proved to have issued from the company's engines, does not of itself justify the inference of negligence.⁵

There are, however, authorities which hold that the fact that

¹ *Crist v. Erie R. Co.*, 58 N. Y. 638, 1 Thomp. & C. 435.

² *Penn. R. Co. v. Stranahan*, 79 Pa. St. 405; *Bevier v. Del. & H. C. Co.*, 13 Hun, 254; *Atchison, T., & S. F. R. Co. v. Stanford*, 12 Kan. 354; *Fitch v. Pacific R. Co.*, 45 Mo. 322, 326, 327; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115, 138.

³ *McCoun v. New York Cent. & H. R. R. Co.*, 66 Barb. 338.

⁴ *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Hoyt v. Jeffers*, 30 Mich. 181, 189; *Woodson v. Mil. & St. P. R. Co.*, 21 Minn. 60; *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271, 295; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389; *Kenney v. Han. & St. J. R. Co.*, 70 Mo. 248; *Fremantle v. London & N. W. R. Co.*, 10 C. B. n. s. 89; *Smith v. London & S. W. R. Co.*, L. R. 6 C. P. 14, L. R. 5 C. P. 98.

⁵ *Ruffner v. Cincinnati, H., & D. R. Co.*, 34 Ohio St. 96; *Phil. & R. R. Co. v. Yeiser*, 8 Pa. St. 366; *McCully v. Clarke*,

40 Pa. St. 399; *Jennings v. Penn. R. Co.*, 37 Leg. Int. 157; *Reading & C. R. Co. v. Latshaw*, 9 Reporter, 798; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218, 29 Barb. 226; *Field v. New York Cent. R. Co.*, 32 N. Y. 339; *Rood v. New York & E. R. Co.*, 18 Barb. 80; *Stuart v. Hawley*, 22 Barb. 619; *Collins v. New York Cent. & H. R. R. Co.*, 5 Hun, 503; *McCaig v. Erie R. Co.*, 8 Hun, 599; *Smith v. Hannibal & St. J. R. Co.*, 37 Mo. 287; *Bryan v. Fowler*, 70 N. C. 596; *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa, 420; *McCummons v. Chicago & N. W. R. Co.*, 33 Iowa, 187; *Garrett v. Chicago & N. W. R. Co.*, 36 Iowa, 121; *Small v. Chicago, R. I., & P. R. Co.*, 50 Iowa, 338; *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143; *Kansas Pacific R. Co. v. Butts*, 7 Kan. 308; *Bachelder v. Heagan*, 18 Me. 32; *Sturgis v. Robbins*, 62 Me. 289; *Baltimore & O. R. Co. v. Woodruff*, 4 Md. 242; *Nitro-Glycerine Cases*, 15 Wall. 524; 5 Am. Law. Rev. (Jan. 1871) pp. 205, 208; 4 Western Jur. (Oct. and Dec. 1870) pp. 333, 429.

the company caused the injury by fire raises the presumption of its negligence, and that, upon this fact appearing, the burden of proof is on the company to disprove negligence by showing that it used the best mechanical contrivances in known practical use to prevent the escape of fire from its engines, and that it managed such engines with due care and skill.¹ This rule has in some States been enacted by statute.²

The company's negligence in causing the fire may be shown by circumstantial evidence, and direct proof of a particular act of negligence is not required.³

Evidence of Negligence.—The company's negligence may be inferred from its failure to provide proper mechanical contrivances for arresting the sparks;⁴ the fact that engines so provided and well constructed do not ordinarily emit sparks or drop coals to a dangerous extent, while the defendant's engines did so emit and drop them;⁵ the unusual character, in size and quantity and distance thrown, of the sparks issued at the time;⁶ the breaking out

¹ *Bass v. Chicago, B., & Q. R. Co.*, 28 Ill. 9; *St. Louis, A., & T. H. R. Co. v. Montgomery*, 39 Ill. 335; *Illinois Cent. R. Co. v. Mills*, 42 Ill. 407; *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110, 33 Wis. 582; *Fitch v. Pacific R. Co.*, 45 Mo. 322; *Bedford v. Han. & St. J. R. Co.*, 46 Mo. 456; *Clemens v. Han. & St. J. R. Co.*, 53 Mo. 366; *Coale v. Han. & St. J. R. Co.*, 60 Mo. 227; *Coates v. Mo., K., & T. R. Co.*, 61 Mo. 38; *Kenney v. Han. & St. J. R. Co.*, 70 Mo. 243, 252; *Burlington & M. R. Co. v. Westover*, 4 Neb. 268; *Burke v. Louisville & N. R. Co.*, 7 Heisk. 451; *Woodson v. Mil. & St. P. R. Co.*, 21 Minn. 60; *Case v. Northern Cent. R. Co.*, 59 Barb. 644; *Aldridge v. Great Western R. Co.*, 3 Man. & G. 515; *Piggot v. Eastern Counties R. Co.*, 3 C. B. 229; *Gibson v. South Eastern R. Co.*, 1 Fost. & F. 23.

² *Baltimore & S. R. Co. v. Woodruff*, 4 Md. 242; *Baltimore & O. R. Co. v. Dorsey*, 37 Md. 19; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251; *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449; *Chicago & N. W. R. Co. v. McCahill*, 56 Ill. 28; *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389; *Chicago & A. R. Co. v. Clamplit*, 63 Ill. 95; *Toledo, W., & W.*

R. Co. v. Larmon, 67 Ill. 68; *Pittsburg, C., & St. L. R. Co. v. Campbell*, 86 Ill. 443; *Small v. Chicago, R. I., & P. R. Co.*, 50 Iowa, 338.

³ *Atchison, T., & S. F. R. Co. v. Stanford*, 12 Kan. 354; *Atchison, T., & S. F. R. Co. v. Bales*, 16 Kan. 252; *Caswell v. Chicago & N. W. R. Co.*, 42 Wis. 193; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa, 420.

⁴ *McCully v. Clarke*, 40 Pa. St. 399; *Lackawanna & B. R. Co. v. Doak*, 52 Pa. St. 379; *Cook v. Champlain Trans. Co.*, 1 Denio, 91; *Gerke v. Cal. Nav. Co.*, 9 Cal. 251; *Anderson v. Cape Fear Steamboat Co.*, 64 N. C. 399; *Ellis v. Portsmouth & R. R. Co.*, 2 Ired. 138; *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa, 420; *Piggot v. Eastern Counties R. Co.*, 3 C. B. 229.

⁵ *Field v. New York Cent. R. Co.*, 32 N. Y. 339; *Atchison, T., & S. F. R. Co. v. Stanford*, 12 Kan. 354; *Hull v. Sacramento Valley R. Co.*, 14 Cal. 387.

⁶ *Huyett v. Phil. & R. R. Co.*, 23 Pa. St. 373; *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa, 420; *Jackson v. Chicago & N. W. R. Co.*, 31 Iowa, 176; *Caswell v. Chicago & N. W. R. Co.*, 42 Wis. 193; *Henry v. Southern Pacific R. Co.*, 50 Cal. 176; *Great Western R. Co. v. Haworth*,

of a series of fires after the engine passed; ¹ the driving of the train at an unlawful rate of speed; ² the defective condition and unskilful management of the engine; ³ the burning of wood in engines adapted only to the burning of coal; ⁴ the indifference and recklessness of the company's servants, as shown in the absence of efforts to arrest the fire; ⁵ the stopping and keeping the engine for some time near the combustible material while a strong wind was blowing the particles of fire in large quantities towards it. ⁶

Evidence that the company's engines at other times, before or after the fire in question, threw sparks as far from the track as the place where the fire began, and that they set other fires, is admitted to show both the possibility that it set the fire in question, and as proof of negligence; ⁷ and it is admitted, although the emission so proved took place at some point remote from the scene of the injury for which the action was brought. ⁸ Proof of a subsequent emission has been rejected when the possibility that the company's engines could communicate the fire was not in question. ⁹

Proof of defects in other engines is not admissible to show

39 Ill. 347; Toledo, P., & W. R. Co. v. Pindar, 53 Ill. 446; Chicago & N. W. R. Co. v. McCahill, 56 Ill. 28; Toledo, W., & W. R. Co. v. Maxfield, 72 Ill. 95; Fitch v. Pacific R. Co., 45 Mo. 322, 327.

¹ Woodson v. Mil. & St. P. R. Co., 21 Minn. 60.

² Martin v. Western Union R. Co., 23 Wis. 437; Gandy v. Chicago & N. W. R. Co., 30 Iowa, 420. But *contra*, unless such rate is shown to have increased the danger of fire. Brusberg v. M., L. S., & W. R. Co., 6 Northwest. Rep. 821.

³ Garrett v. Chicago & N. W. R. Co., 36 Iowa, 121; Chicago & A. R. Co. v. Quaintance, 58 Ill. 389.

⁴ St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47; Chicago & A. R. Co. v. Quaintance, 58 Ill. 389.

⁵ Rolke v. Chicago & N. W. R. Co., 26 Wis. 537; Kenney v. Han. & St. J. R. Co., 63 Mo. 99; Bass v. Chicago, B., & Q. R. Co., 28 Ill. 9.

⁶ Fero v. Buffalo & S. L. R. Co., 22 N. Y. 209.

⁷ Sheldon v. Hudson River R. Co., 14 N. Y. 218, 29 Barb. 226; Hinds v. Barton, 25 N. Y. 544; Field v. New York Cent. R. Co., 32 N. Y. 339, 29 Barb. 176; Webb v.

Rome, W., & O. R. Co., 49 N. Y. 420, 3 Lans. 453; Crist v. Erie R. Co., 58 N. Y. 638, 1 Thomp. & C. 435; Westfall v. Erie R. Co., 5 Hun. 75; St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47; Atchison, T., & S. F. R. Co. v. Stanford, 12 Kan. 354; Annapolis & E. R. Co. v. Gantt, 39 Md. 115; Cleaveland v. Grand Trunk R. Co., 42 Vt. 449; Hoyt v. Jeffers, 30 Mich. 181, 190; Henry v. Southern Pacific R. Co., 50 Cal. 176; Huyett v. Phil. & R. R. Co., 23 Pa. St. 373; Longabaugh v. Virginia City & T. R. Co., 9 Nev. 271; Ross v. Boston & W. R. Co., 6 Allen, 87; Gagg v. Vetter, 41 Ind. 228; Grand Trunk R. Co. v. Richardson, 91 U. S. 454; Burke v. Louisville & N. R. Co., 7 Heisk. 451; Piggot v. Eastern Counties R. Co., 3 C. B. 229. But see Baltimore & S. R. Co. v. Woodruff, 4 Md. 242; Lester v. Kansas City, St. J., & C. B. R. Co., 60 Mo. 265; Phil. & R. R. Co. v. Yeiser, 8 Pa. St. 366; Edwards v. Ottawa River Nav. Co., 39 Upper Can. Q. B. 264; *ante*, Chap. X. p. 293.

⁸ Penn. R. Co. v. Stranahan, 79 Pa. St. 405.

⁹ Smith v. Old Colony & N. R. Co., 10 R. I. 22.

defects in the engine which caused the injury.¹ Evidence that the company burned wood in engines generally, is admitted to show that it burned wood in a particular engine.² Evidence is admissible, in proof of the company's negligence, that well-conducted companies are accustomed to use precautions which the defendant neglected;³ but proof of the usage of other companies to omit certain precautions when offered by the company has been rejected.⁴ The company cannot give proof of its usage in regard to the construction and condition of its engines, but it may show that they had been duly inspected.⁵ Where the plaintiff's evidence fails to identify the particular engine which caused the damage, evidence is admissible for the company that all its engines were at the time provided with the most approved contrivances to prevent the escape of fire.⁶

The failure to use proper precautions may be proved by evidence that engines provided with suitable mechanical contrivances do not throw sparks to the distance and in the same destructive manner as they were thrown by the company's engines.⁷

The testimony of experts is competent to show that the engine from which the sparks causing the fire issued was in good condition,⁸ or what mechanical contrivances will prevent or diminish the issue of sparks or the dropping of coals;⁹ but it is not admitted to state conclusions based on common observation, such as the action of fire, or what is to be considered exposure to it, or what was the proximate cause of the injury.¹⁰

Questions for the Jury. — It is for the jury to determine, as questions of fact, whether the company caused the fire,¹¹ whether it

¹ *Erie R. Co. v. Decker*, 78 Pa. St. 293; *Jennings v. Penn. R. Co.*, 37 Leg. Int. 157.

² *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47.

³ *Cook v. Champlain Trans. Co.*, 1 Denio, 91.

⁴ *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454. See *Frankford & B. Turnp. Co. v. Phil. & T. R. Co.*, 54 Pa. St. 345.

⁵ *Baltimore & O. R. Co. v. Shipley*, 39 Md. 251; *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389; *Cleaveland v. Grand Trunk R. Co.*, 42 Vt. 449.

⁶ *Haley v. St. Louis, K. C., & N. R. Co.*, 69 Mo. 614.

⁷ *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355.

⁸ *Great Western R. Co. v. Haworth*, 39 Ill. 346.

⁹ *Steinweg v. Erie R. Co.*, 43 N. Y. 123; *Bedell v. Long Island R. Co.*, 44 N. Y. 367; *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355.

¹⁰ *Milwaukie & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Higgins v. Dewey*, 107 Mass. 494; *Teall v. Barton*, 40 Barb. 137.

¹¹ *Briggs v. New York Cent. & H. R. R. Co.*, 72 N. Y. 26; *Phil. & R. R. Co. v. Hendrickson*, 80 Pa. St. 182; *Chicago & A. R. Co. v. Quaintance*, 58 Ill. 389;

caused the injury by the negligent construction or management of its engines,¹ whether it availed itself of the best mechanical contrivances in known practical use to prevent the injurious escape of fire,² and whether the plaintiff was himself chargeable with contributory negligence.³

The court will order a nonsuit or verdict for the defendant where there is no evidence from which the jury can reasonably find that the defendant caused the injury, and was chargeable with negligence, but not where there is evidence sufficient to sustain a verdict for the plaintiff.⁴ The verdict will be set aside when clearly against the weight of evidence, but not merely because it is against the preponderance.⁵ It will be set aside where the jury found against the uncontradicted evidence in the case.⁶

Causa Proxima. — The ignition for which the company is liable need not take place from the very particles of fire thrown out by

Baltimore & O. R. Co. v. Shipley, 39 Md. 251; Kellogg v. Mil. & St. P. R. Co., 5 Dill. 537, 94 U. S. 469.

¹ Smith v. Old Colony & N. R. Co., 10 R. I. 22; Huyett v. Phil. & R. R. Co., 23 Pa. St. 373; McCully v. Clarke, 40 Pa. St. 399; Penn. R. Co. v. Hope, 80 Pa. St. 373; Webb v. Rome, W., & O. R. Co., 49 N. Y. 420, 3 Lans. 453; Briggs v. New York Cent. & H. R. R. Co., 72 N. Y. 26; Hays v. Miller, 6 Hun, 320; Gagg v. Vetter, 41 Ind. 228; Chicago & A. R. Co. v. Pennell, 94 Ill. 448; Jackson v. Chicago & N. W. R. Co., 31 Iowa, 176; Atchison, T., & S. F. R. Co. v. Bales, 16 Kan. 252; Gerke v. Cal. Nav. Co., 9 Cal. 251; Hull v. Sacramento Valley R. Co., 14 Cal. 387; McCready v. So. Car. R. Co., 2 Strob. 356; Kellogg v. Mil. & St. P. R. Co., 5 Dill. 537, 94 U. S. 469; Aldridge v. Great Western R. Co., 3 M. & G. 515.

² Steinweg v. Erie R. Co., 43 N. Y. 123; Lackawanna & B. R. Co. v. Doak, 52 Pa. St. 379; Frankford & B. T. Co. v. Phil. & T. R. Co., 54 Pa. St. 345; St. Louis, A., & T. H. R. Co. v. Gilham, 39 Ill. 455; Toledo, P., & W. R. Co. v. Pindar, 53 Ill. 447; Spaulding v. Chicago & N. W. R. Co., 33 Wis. 582, 30 Wis. 110; Read v. Morse, 34 Wis. 315; Burlington & M. R. Co. v. Westover, 4 Neb. 268; Fremantle v. London & N. W. R. Co., 10

C. B. N. s. 89, 2 Fost. & F. 337; Longman v. Grand Junct. Can. Co., 3 Fost. & F. 736.

³ Fero v. Buffalo & S. L. R. Co., 22 N. Y. 209; Collins v. New York Cent. & H. R. R. Co., 5 Hun, 499; Bevier v. Del. & H. C. Co., 13 Hun, 254; St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47; Great Western R. Co. v. Haworth, 39 Ill. 346; Illinois Cent. R. Co. v. Nunn, 51 Ill. 78; Murphy v. Chicago & N. W. R. Co., 45 Wis. 222; McCully v. Clarke, 40 Pa. St. 399; Ross v. Boston & W. R. Co., 6 Allen, 87; Louisville, N. A., & C. R. Co. v. Richardson, 66 Ind. 43.

⁴ Phil. & R. R. Co. v. Yerger, 73 Pa. St. 121; Sheldon v. Hudson River R. Co., 29 Barb. 226, 14 N. Y. 218; Smith v. Han. & St. J. R. Co., 37 Mo. 287; Aldridge v. Great Western R. Co., 3 M. & G. 515.

⁵ Gandy v. Chicago & N. W. R. Co., 30 Iowa, 420; St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47; Atchison, T., & S. F. R. Co. v. Stanford, 12 Kan. 354; Atchison, T., & S. F. R. Co. v. Campbell, 16 Kan. 200; Kansas Pacific R. Co. v. Brady, 17 Kan. 380; Gagg v. Vetter, 41 Ind. 228.

⁶ Read v. Morse, 34 Wis. 315; Spaulding v. Chicago & N. R. Co., 33 Wis. 582, 30 Wis. 110; Fremantle v. London & N. W. R. Co., 10 C. B. N. s. 89.

its engines, but it is liable for the injuries by fire caused by its spreading from the matter first ignited; and it is not material that between the property burned and that on which the particles of fire from the engines fell there intervened a considerable space, diversity of ownership, or various physical objects, or that the fire after igniting one object spread on the ground, or was carried by oil or running water, or was driven through the air, or carried by fluctuations in the wind.¹ This rule has been applied in the construction of statutes imposing liability, even without negligence, on the company for injuries by fire which it has caused.² The company has been held liable for injuries by fire which has spread to property situated half a mile, and even four or eight miles, from the object ignited by sparks from its engines.³

The rule of liability has been stated as follows: Where a fire originates in the negligence of a defendant, and is carried directly by a material force, whether it be the wind, the law of gravitation, combustible matter existing in a state of nature, or other means, to the plaintiff's property, and destroys it, and it appears that no object intervened between the point where the fire started and the injury, which would have prevented the injury if due care had been taken, the defendant is legally answerable for the loss. In applying this rule, it was held that the company was liable where by its negligence a train laden with oil collided with a locomotive attached to a freight train, and the tanks being

¹ Penn. R. Co. v. Hope, 80 Pa. St. 373; Penn. & N. Y. C. & R. Co. v. Lacey, 89 Pa. St. 458; Kellogg v. Chicago & N. W. R. Co., 26 Wis. 223; Delaware, L., & W. R. Co. v. Salmon, 10 Vroom, 299, 9 Vroom, 5; Kuhn v. Jewett, 5 Stewart (N. J.), 647; Perley v. Eastern R. Co., 98 Mass. 414; Milwaukie & St. P. R. Co. v. Kellogg, 94 U. S. 469, 5 Dill. 537; St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47; Atchison, T., & S. F. R. Co. v. Stanford, 12 Kan. 354; Atchison, T., & S. F. R. Co. v. Bales, 16 Kan. 252; Hoyt v. Jeffers, 30 Mich. 181, 199; Webb v. Rome, W., & O. R. Co., 49 N. Y. 420, 3 Lans. 453; McCoun v. New York Cent. & H. R. R. Co., 66 Barb. 338; Toledo, P., & W. R. Co. v. Pindar, 53 Ill. 447; Fent v. Toledo, P., & W. R. Co., 59 Ill. 349; Toledo, W., & W. R. Co. v. Muthersbaugh, 71 Ill. 572; Toledo, W., & W. R. Co. v. Maxfield, 72

Ill. 95; Coates v. Mo., K., & T. R. Co., 61 Mo. 38; Poeppers v. Mo., K., & T. R. Co., 67 Mo. 715; Burlington & M. R. Co. v. Westover, 4 Neb. 268; Longabaugh v. Virginia City & T. R. Co., 9 Nev. 271, 294; Henry v. Southern Pacific R. Co., 50 Cal. 176; Annapolis & E. R. Co. v. Gantt, 39 Md. 115; Phil., W., & B. R. Co. v. Constable, 39 Md. 149; Baltimore & O. R. Co. v. Shipley, 39 Md. 251; Troxler v. Richmond & D. R. Co., 74 N. C. 377; Smith v. London & S. W. R. Co., L. R. 6 C. P. 14, L. R. 5 C. P. 98. See White v. Colorado Cent. R. Co., 5 Dill. 428.

² See *post*, p. 445.

³ Perley v. Eastern R. Co., 98 Mass. 414; Atchison, T., & S. F. R. Co. v. Stanford, 12 Kan. 354; Poeppers v. Mo., K., & T. R. Co., 67 Mo. 715.

thrown from the train and bursting, and the oil having been ignited from the locomotive ran into a brook flowing under the railroad, and from the brook into a river, and set fire to and destroyed the plaintiff's building which was situated on the river-bank. It was considered that there was no independent agency intervening between the company's culpable act and the injury, so as to break the connection between the two, as cause and effect.¹

This severe rule, imposing unlimited liability for the consequences of a negligent act, has seemed to some jurists to conflict with justice as well as with the maxim *causa proxima non remota spectatur*;² and in two cases, — one decided in New York and the other in Pennsylvania, — which have been the subject of much comment, the liability was restricted to the property directly set on fire by the sparks which had been negligently thrown out. The company, it was held, was liable for the burning of a building which it had negligently set on fire, but not for that of other buildings to which the fire had then spread. The injury to such other buildings was deemed too remote, and not the natural and probable consequence of the negligent act. It was not a consequence which could have been foreseen by the wrong-doer, and was separated from his act by an intervening cause.³

The rule which, in general, limits the liability to the building directly set on fire by the company is held, however, in Pennsylvania, not to be a conclusion of law so as to exclude liability for injuries by the spreading of the fire, where special circumstances are shown which made such spreading a natural and probable consequence of the company's negligence.⁴

The question of remote or proximate cause, where the facts are not in dispute, is one which is peculiarly within the province of the court, and certainly a jury could not apply the subtle formulas

¹ Kuhn v. Jewett, 5 Stewart (N. J.), 647. *Contra*, Hoag v. Lake Shore & M. S. R. Co., 85 Pa. St. 293.

² Wharton on Neg. §§ 135, 150; Southern Law Review (Jan. 1876), vol. i., n. s. p. 729.

³ Ryan v. New York Cent. R. Co., 35 N. Y. 210; Penn. R. Co. v. Kerr, 62 Pa. St. 353. See comments on these cases in Webb v. Rome, W., & O. R. Co., 49 N.Y.

420, 3 Lans. 453; Oil Creek & A. R. Co. v. Keighron, 74 Pa. St. 316; Penn. R. Co. v. Hope, 80 Pa. St. 373; Milwaukie & St. P. R. Co. v. Kellogg, 94 U. S. 469, 474.

⁴ Webb v. Rome, W., & O. R. Co., 49 N. Y. 420, 3 Lans. 453; Oil Creek & A. R. Co. v. Keighron, 74 Pa. St. 316; Penn. R. Co. v. Hope, 80 Pa. St. 373; Penn. & N. Y. C. & R. Co. v. Lacey, 89 Pa. St. 458.

to which the question has given rise.¹ It has, however, been treated in well-considered cases as one of fact, and the jury is to determine whether the burning of the property to which the fire spread was the natural and probable consequence of the wrongful act, and ought to have been foreseen as such, and whether there was a continuous succession of events connecting the injury and such act, or whether it was broken by some intervening cause which was not under the wrong-doer's control, and therefore could not have been foreseen.²

The cessation and apparent extinction of the fire, or the negligence of persons engaged in extinguishing it, has been held so to interrupt the succession of events that the original wrong-doer is not responsible for the injuries resulting from its starting afresh, and spreading by the force of the wind.³ So also the spreading of the fire to a great distance in consequence of a high wind has been held not to be the natural and probable consequence of the original culpable act which started the fire.⁴

Liability without Negligence under Statutes.—Statutes have been enacted making the company liable, even in the absence of negligence, for injuries to private property caused by fire communicated by its engines, which in effect make it an insurer in the case of such injuries.⁵ These statutes are constitutional, even

¹ See *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St. 293, where the court held that upon the facts of the case an independent agency had intervened, so that the defendants' negligence was not the proximate cause of the injury, and that it was not error to direct a verdict for the defendants.

² *Penn. R. Co. v. Hope*, 80 Pa. St. 373; *Penn. & N. Y. Canal & R. Co. v. Lacey*, 89 Pa. St. 458; *Atchison, T., & S. F. R. Co. v. Bales*, 16 Kan. 252; *Milwaukie & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Delaware, L., & W. R. Co. v. Salmon*, 10 Vroom, 299, 9 Vroom, 5; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Perry v. Southern Pacific R. Co.*, 50 Cal. 578; *Clemens v. Han. & St. J. R. Co.*, 53 Mo. 366; *Toledo, P., & W. R. Co. v. Pindar*, 53 Ill. 447; *Fent v. Toledo, P., & W. R. Co.*, 59 Ill. 349; *Toledo, W., & W. R. Co. v. Murthersbaugh*, 71 Ill. 572.

³ *Doggett v. Richmond & D. R. Co.*, 73 N. C. 305.

⁴ *Toledo, W., & W. R. Co. v. Murthersbaugh*, 71 Ill. 572; *Fent v. Toledo, P., & W. R. Co.*, 59 Ill. 349. But it is also held that the contingency of a high wind is one to be anticipated by the company. *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223, 237.

⁵ *Mass. Acts*, 1874, ch. 372, § 106. "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, and shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf." This statute, with only verbal variations, was enacted in 1840, and a similar one was enacted in Maine in 1842. See con-

when applied to pre-existing corporations,¹ and, being remedial, are construed as applying to such pre-existing corporations.² They are also held, in the absence of an agreement to waive the rights created by them, to be for the benefit of persons from whom the company had purchased or taken land, although the risk of fire may have been an element in the price paid or compensation awarded.³

The statutes imposing on railroad corporations liability for injuries by fire, even without negligence, have usually given them, by express provision, an insurable interest in the property for which they are made responsible;⁴ and the clause imposing such additional liability and the clause giving the right to insure are held to be coextensive and to interpret each other.⁵ The phrase "property along the route" in the Vermont statute includes property of individuals lawfully placed within the location.⁶

The liability under the statute extends not only to buildings, but to growing trees.⁷ In one State, it has been held not to extend to movable property;⁸ but this limitation has been rejected in another.⁹

The liability under the statute is not limited to property on which the particles of fire issuing from the engines fell, but it extends to all property to which the fire so originating has been communicated.¹⁰

struction of the Kansas statute, G. S. ch. 118, § 2, by which the company's negligence is held essential to a right of action. *Missouri, K., & T. R. Co. v. Davidson*, 14 Kan. 349. The Iowa statute, which provides that the corporation "shall be liable for all damages by fire that is set out or caused by operation of any such railway," is held, while making the fact of the injury *prima facie* proof of negligence, not to impose an absolute liability, but to admit the defence that the injury was not caused by the company's negligence. *Small v. Chicago, R. I., & P. R. Co.*, 50 Iowa, 338; *Slosson v. B. C. R. & N. R. Co.*, 51 Iowa, 294; *Libby v. Chicago, R. I., & P. R. Co.*, 52 Iowa, 92.

¹ *Lyman v. Boston & W. R. Co.*, 4 Cush. 288; *Rodemacher v. Milwaukie & St. P. R. Co.*, 41 Iowa, 297.

² *Lyman v. Boston & W. R. Co.*, 4 Cush. 288; *Ingersoll v. Stockbridge & P.*

R. Co., 8 Allen, 438; *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579; *Ross v. Boston & W. R. Co.*, 6 Allen, 87.

³ *Lyman v. Boston & W. R. Co.*, 4 Cush. 288; *Pierce v. Worcester & N. R. Co.*, 105 Mass. 199.

⁴ *Hart v. Western R. Co.*, 13 Met. 99; *Eastern R. Co. v. Relief Ins. Co.*, 105 Mass. 570.

⁵ *Chapman v. Atlantic & St. L. R. Co.*, 37 Me. 92; *Ross v. Boston & W. R. Co.*, 6 Allen, 87.

⁶ *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

⁷ *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579; *Ross v. Boston & W. R. Co.*, 6 Allen, 87.

⁸ *Chapman v. Atlantic & St. L. R. Co.*, 37 Me. 92.

⁹ *Ross v. Boston & W. R. Co.*, 6 Allen, 87.

¹⁰ *Hart v. Western R. Co.*, 13 Met. 99;

The company owning the railroad is liable under the statute for injuries caused by other parties whom it permits to work it under an agreement or lease;¹ and the parties working it as lessees or trustees, if bondholders, are also held liable for the injuries caused by them.² A company which, as lessee of a railroad, permits parties to use it is liable for their negligence in communicating fire to the property of others.³

The statute has been construed to exclude the defence of the plaintiff's contributory negligence, where no fraud or intentional exposure of his property is shown.⁴

Damages. — The measure of damages for property wholly destroyed by fire is the market value thereof;⁵ or, if only injured or partially destroyed, the difference between the market value before and after the injury.⁶ The market value is the test even, it has been held, in the case of fruit-trees or other property attached to the realty the value of which can be measured independently.⁷ Evidence of the cost of new buildings has been admitted as one mode of estimating the value of old buildings which were destroyed.⁸

Insurance as affecting the Right to the Damages. — The amount recovered by the plaintiff on a policy of insurance on the property injured or destroyed is not to be deducted from his damages.⁹

Ingersoll v. Stockbridge & P. R. Co., 8 Allen, 438; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Hooksett v. Concord R. Co.*, 38 N. H. 242; *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579.

¹ *Ingersoll v. Stockbridge & P. R. Co.*, 8 Allen, 438; *Daniels v. Hart*, 118 Mass. 543; *Davis v. Providence & W. R. Co.*, 121 Mass. 134; *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 95; *Bean v. Atlantic & St. L. R. Co.*, 63 Me. 293. The same rule is held where the action is at common law for negligence. *Pittsburg, C., & St. L. R. Co. v. Campbell*, 86 Ill. 443; *Delaware, L., & W. R. Co. v. Salmon*, 10 Vroom, 299, 315, 9 Vroom, 5; *ante*, Chap. X. pp. 284, 285.

² *Pierce v. Concord R. Co.*, 51 N. H. 590; *Daniels v. Hart*, 118 Mass. 543; *Davis v. Providence & W. R. Co.*, 121 Mass. 134.

³ *Pittsburg, C., & St. L. R. Co. v. Campbell*, 86 Ill. 443.

⁴ *Rowell v. Railroad Co.*, 57 N. H. 132. But see *Ross v. Boston & W. R. Co.*, 6 Allen, 87; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

⁵ *Burke v. Louisville & N. R. Co.*, 7 Heisk. 451, 465; *Donald v. St. Louis, K. C., & N. R. Co.*, 44 Iowa, 457; *Atchison, T., & S. F. R. Co. v. Stanford*, 12 Kan. 354.

⁶ *Bevier v. Del. & H. C. Co.*, 13 Hun, 254, 260; *Atchinson v. Atlantic & P. R. Co.*, 63 Mo. 367.

⁷ *Whitbeck v. New York Cent. R. Co.*, 36 Barb. 644.

⁸ *Cleland v. Thornton*, 43 Cal. 437.

⁹ *Collins v. New York Cent. & H. R. Co.*, 5 Hun, 503; *Briggs v. New York Cent. & H. R. R. Co.*, 72 N. Y. 26; *Weber v. Morris & E. R. Co.*, 6 Vroom, 409; *ante*, Chap. X. p. 304.

The insurer, upon paying the amount of the policy, is subrogated to the right of the assured against the railroad company, and may prosecute an action against it in the name of the assured, who cannot release the right of action.¹ The assured, upon receiving his damages from the railroad company, will become a trustee for the insurer to the amount he has received on his policy;² or, if he has not already been paid by the insurer, the amount received as damages from the railroad company will be applied *pro tanto* in discharge of the policy.³ If the railroad company pays the assured with knowledge that he has already been paid by the insurer, it is liable also to the insurer to the amount which he has so paid.⁴

Plaintiff's Title.—A vendee in possession under a contract of sale may maintain an action for injuries by fire communicated by the company's negligence.⁵ Under a statute of Iowa a controversy as to the ownership of land was held immaterial, where the plaintiff had erected the buildings in good faith under color of right.⁶

¹ Hart v. Western R. Co., 13 Met. 99; Monmouth Co. Fire Ins. Co. v. Hutchinson, 6 C. E. Green, 107; Swarthout v. Chicago & N. W. R. Co., 6 Northwest Rep. 314. See Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382.

² Weber v. Morris & E. R. Co., 6 Vroom, 409; Monmouth Co. Fire Ins. Co. v. Hutchinson, 6 C. E. Green, 107.

³ Conn. Fire Ins. Co. v. Erie R. Co., 73 N. Y. 399, 10 Hun, 59.

⁴ Monmouth Co. Fire Ins. Co. v. Hutchinson, 6 C. E. Green, 107; Conn. Fire Ins. Co. v. Erie R. Co., 73 N. Y. 399, 10 Hun, 59.

⁵ Hays v. Miller, 6 Hun, 320; Miller v. Long Island R. Co., 9 Hun, 194; Rood v. New York & E. R. Co., 18 Barb. 80.

⁶ Milwaukie & St. P. R. Co. v. Kellogg, 94 U. S. 469, 5 Dill. 537.

CHAPTER XVII.

LEGISLATIVE POWER OVER THE COMPANY.

The Charter, a Contract within the Constitution of the United States.—It is provided in the tenth section of the first article of the Constitution that “No State shall . . . pass any . . . law impairing the obligation of contracts.” Charters granted to private corporations by a State are, by a construction now settled, *contracts* within the meaning of this clause. They confer rights and privileges on the grantees, on the faith of which the charter is accepted, and involve corresponding duties and obligations on their part. They imply a contract on the part of the State for the quiet enjoyment and unimpaired security of the privileges so granted. The franchises and immunities are incorporeal hereditaments, and, like any other kind of property, may be the subject of grant and contract.¹ A railroad company is a private corporation, the charter of which is a contract between the company and the State, and the rights and privileges granted by the charter are within the protection of the Constitution.²

¹ *Dartmouth College v. Woodward*, 4 Wheat. 518; *Wilmington R. Co. v. Reid*, 13 Wall. 264; *Miller v. State*, 15 Wall. 478, 488; *Holyoke Co. v. Lyman*, 15 Wall. 500, 511; *Delaware Tax Cases*, 18 Wall. 206; *Chicago, B., & Q. R. Co. v. Iowa*, 94 U. S. 155, 161; *Farrington v. Tennessee*, 95 U. S. 679; *Stone v. Mississippi*, 101 U. S. 814; *St. Louis R. Co. v. Northwestern St. L. R. Co.*, 69 Mo. 65; *Washington Bridge Co. v. State*, 18 Conn. 53; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140; *Chesapeake & O. Canal Co. v. Balt. & O. R. Co.*, 4 Gill & J. 1; *Erie & N. E. R. Co. v. Casey*, 26 Pa. St. 287; *Phil., W., & B. R. Co. v. Bowers*, 4 Houst. 506; *State v. Noyes*, 47 Me. 189; *Commonwealth v. Eastern R. Co.*, 103 Mass. 254. The doctrine of the *Dartmouth College Case*—that a legislative grant of corpo-

rate powers is a contract within the meaning of the Constitution—has not escaped criticism; and it has been maintained that such a construction of the word “contract” was not in the minds of its framers. *Toledo Bank v. Bond*, 1 Ohio St. 622, 629; *Debolt v. Ohio Life Ins. & T. Co.*, 1 Ohio St. 563, 555; *Attorney-General v. Railroad Cos.*, 35 Wis. 425, 563–569; 8 *American Law Review* (Jan. 1874), 189. See Shirley on “The Dartmouth College Causes.” The decision was regarded at the time as an invaluable security of property and vested rights; but it has been deprived of its force by a reserved power of amendment, the broad construction of the police power, and the strict construction of grants affecting public interests.

² *Ante*, Chap. I. p. 1.

The charter of a public corporation, as a city, town, or county, is not a contract within the meaning of the Constitution. These corporations are instruments of government, and, unless protected by provisions of the State Constitution, may be changed by the legislature at its discretion.¹ A railroad company, if its stock is owned wholly by the State, is a public corporation, but is not such if its stock is only in part owned by the State.² The fact that the company serves the government as a common carrier does not convert it into a political agency, or take from it the character of a private corporation.³ A national grant to the company does not make it a public corporation.⁴ The charter of a private corporation may contain provisions of a public character, or public regulations which are subject to alteration.⁵

Assent of the Corporation to Amendments.— Amendments of the charter which impair the obligation of the contract become binding by the assent of the corporation,⁶ and such assent may be implied as well as formally expressed.⁷

Form of the Grant or Contract.— A grant, in order to be binding, need not be in the form of a contract; but it is sufficient if the terms used are in effect a contract, and pledge the faith of the State. This principle has been applied to grants of exclusive rights,⁸ and of exemptions from taxation.⁹ But in a matter of public interest the intention of the State to bind itself, as by a contract, must clearly appear in some form.¹⁰ The assent of the

¹ *Rader v. Southeastern Road Dist.*, 7 Vroom, 273; *Pumphrey v. Baltimore*, 47 Md. 145; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 533; *Newton v. Commissioners*, 100 U. S. 548; *State v. Balt. & O. R. Co.*, 12 Gill & J. 399, 440; *Cooley Const. Lim.* 192, 193.

² *Dartmouth College v. Woodward*, 4 Wheat. 518, 668, 669; *United States Bank v. Planters' Bank*, 9 Wheat. 904, 907; *Bardstown & L. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199, 205; *ante*, Chap. I. p. 1.

³ *Union Pacific R. Co. v. Peniston*, 18 Wall. 5; *United States v. Union Pacific R. Co.*, 98 U. S. 569, 617-619.

⁴ *Peik v. Chicago & N. W. R. Co.*, 6 Biss. 177, 94 U. S. 164.

⁵ *Regents of University v. Williams*, 9 Gill & J. 365.

⁶ *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559. The assent of bondholders to amendments of the charter is not required. *Vermont & C. R. Co. v. Vt. Cent. R. Co.*, 34 Vt. 1, 51. See *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42.

⁷ *Snead v. Indianapolis, P., & C. R. Co.*, 11 Ind. 104; *Bangor, O., & M. R. Co. v. Smith*, 47 Me. 34.

⁸ *Post*, p. 454; *New Jersey v. Yard*, 95 U. S. 104, 113, 114.

⁹ *Post*, Chap. XVIII. pp. 482, 483.

¹⁰ *Newton v. Commissioners*, 100 U. S. 548. An act for lending the State credit, when accepted and acted upon, has been held to be a contract. *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371.

parties being essential to a contract, a charter does not become one until it is accepted, and before acceptance it may be revoked.¹

Effect of the Constitutional Provision.—A corporation, when protected by this provision, cannot, as a general rule, be subjected by subsequent legislation to obligations and burdens not imposed in the charter. Thus, a turnpike company cannot be required to remove gates which it was authorized by its charter to erect and fix,² or to allow the inhabitants of a certain place to pass free of toll;³ or a bridge company to widen the draws of a bridge over navigable waters, or to change its location;⁴ or a canal company to maintain bridges connecting highways intersected by the canal which it was not required by its charter to maintain,⁵ or to change its dams for the preservation of fish;⁶ or a plank-road company to keep its road in a better condition than was prescribed by its charter, with a higher penalty of forfeiture;⁷ or a railroad company to pay consequential damages to land-owners for which it was not liable when incorporated,⁸ or to wait for trains at a connection with the railroad of another company where only the public convenience is concerned,⁹ or to make crossings for new highways by grading the approaches,¹⁰ or to pay the expenses of a coroner's inquest, or the expenses of persons injured while on its trains where it was not in fault.¹¹ Some of these impositions have been justified under the police power hereafter to be referred to.

The State cannot convert an absolute into a conditional contract;¹² or impair the obligation of the contract between the corporation and its stockholders;¹³ or impose an additional liability

¹ *State v. Balt. & O. R. Co.*, 12 Gill & J. 399; *Mississippi Society v. Musgrove*, 44 Miss. 820.

² *Attorney-General v. Germantown & P. Turnp. Road*, 55 Pa. St. 466.

³ *Pingry v. Washburn*, 1 Aiken, 264.

⁴ *Commonwealth v. New Bedford Bridge*, 2 Gray, 339.

⁵ *City of Erie v. Erie Canal Co.*, 59 Pa. St. 174.

⁶ *Commonwealth v. Penn. Canal Co.*, 66 Pa. St. 41. See *Commonwealth v. Essex Co.*, 13 Gray, 239; *Holyoke Co. v. Lyman*, 15 Wall. 500, 104 Mass. 446.

⁷ *People v. Jackson & M. Plank Road Co.*, 9 Mich. 285.

⁸ *Bailey v. Phil., W., & B. R. Co.*, 4 Harring. (Del.) 389; *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379; *Towle v. Eastern R. Co.*, 18 N. H. 547, 17 N. H. 519.

⁹ *State v. Noyes*, 47 Me. 189.

¹⁰ *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447.

¹¹ *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55.

¹² *Nichols v. Somerset & K. R. Co.*, 43 Me. 356.

¹³ *New Orleans, J., & G. N. R. Co. v.*

on stockholders without their assent;¹ or modify their right to vote on each share for the whole number of directors by allowing any stockholder to vote according to the "cumulative" method.² Municipal corporations may be disabled, both by the constitutional prohibition and the general limitation of their powers, from imposing burdens on railroad companies.³

Obligation and Remedy distinguished.—The *obligation* of a contract is distinguished from the *remedy* for enforcing it. There is much learning in relation to this distinction which it does not seem necessary to review in this connection. The distinction itself has been sometimes thought to be one of form rather than of substance.⁴ Legal obligations can only exist where there are means of enforcing them; and while the State may, unless otherwise stipulated, change modes of procedure,⁵ rules of pleading, venue, jurisdiction of courts, and service of process, and even modify in a certain degree essential remedies,⁶ it cannot take away the remedies existing when the contract was made in a way to impair substantial rights. To this extent the laws for enforcing contracts enter into the contract itself.⁷

The State may, without violating this provision of the National Constitution, change the mode of taking lands, transfer the duty of assessing the damages from one tribunal to another, give a right of appeal, and extend the time within which claims for

Harris, 27 Miss. 517; *University v. North Carolina R. Co.*, 76 N. C. 103; *Zabriskie v. Hackensack & N. Y. R. Co.*, 3 C. E. Green, 178; *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571, 581; *Sage v. Dillard*, 15 B. Monr. 340; *Miller v. State*, 15 Wall. 478, 498.

¹ *Ireland v. Palestine, B., N. P., & N. W. Turnp. Co.*, 19 Ohio St. 369.

² *Hays v. Commonwealth*, 82 Pa. St. 518.

³ *New York v. Second Av. R. Co.*, 32 N. Y. 261; *New York v. Third Av. R. Co.*, 33 N. Y. 42; *State v. Jersey City*, 5 Dutcher, 170; *Chicago v. Sheldon*, 9 Wall. 50; *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447; *Des Moines v. Chicago, R. I., & P. R. Co.*, 41 Iowa, 569.

⁴ *Cooley's Const. Lim. ch. ix.*; *Pomeroy's Const. Law*, §§ 538-627; *Story on the Const. ch. xxxiv.*

⁵ *Cairo & F. R. Co. v. Hecht*, 95 U. S.

168; *Tennessee v. Sneed*, 96 U. S. 69; *Gowen v. Penobscot R. Co.*, 44 Me. 140; *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 95.

⁶ *North East & S. W. A. R. Co., In re*, 37 Ala. 679; *Watson v. New York Cent. R. Co.*, 47 N. Y. 157; *Rader v. Southeastern Road Dist.*, 7 Vroom, 273; *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 95; *Cairo & F. R. Co. v. Hecht*, 95 U. S. 168; *Taylor v. Stockwell*, 12 Chicago Leg. News, 3; *Little Miami R. Co. v. Com'rs*, 31 Ohio St. 338.

⁷ *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608; *Von Hoffman v. Quincy*, 4 Wall. 535; *Butz v. Muscatine*, 8 Wall. 575; *White v. Hart*, 13 Wall. 646; *Edwards v. Kearsney*, 96 U. S. 595; *Brine v. Insurance Co.*, 96 U. S. 627; *Penrose v. Erie Canal Co.*, 56 Pa. St. 46; *Scaine v. Belleville*, 10 Vroom, 526.

land damages may be made;¹ impose penalties for breaches of existing corporate duties;² provide a new mode for determining the respective rights of companies owning connecting railroads,³ and additional remedies for enforcing the debts of the corporation, as by a sale of its property and franchises and a distribution of the proceeds among its creditors.⁴

The legislature may give a remedy for injuries not previously actionable. Thus, in the case of injuries immediately fatal, for which the common law allows no right of action, it may make the company liable in an action for damages, or to a penalty recoverable by indictment; the amount so recovered in either case to be distributed among the personal representatives of the deceased. The act superadds a legal to an existing moral obligation, and enforces an admitted duty by a civil or criminal proceeding.⁵ The legislature may impose a liability to servants for the injuries caused by the negligence of fellow-servants.⁶ It may inflict additional penalties on the company for exceeding the rates of charges already fixed by the charter.⁷ But, although it may enlarge and perfect the remedy, it cannot create a liability for antecedent acts, for which, when committed, there was no liability.⁸ It may authorize the corporation to mortgage its road and property, or to issue preferred stock.⁹

While the State cannot impair the obligation of a contract, so also it cannot make one between the parties. If a subscriber for capital stock is not bound because of non-payment of the first instalment, the contract cannot be made valid by a subsequent statute.¹⁰

Exclusive Rights not implied. — The grant of a franchise in matters affecting the public interests is to be construed strictly,

¹ *Gowen v. Penobscot R. Co.*, 44 Me. 140; *Portland & O. C. R. Co. v. Grand Trunk R. Co.*, 46 Me. 69; *Long's Appeal*, 87 Pa. St. 114; *McCrea v. Port Royal R. Co.*, 3 S. C. 381; *Baltimore & S. R. Co. v. Nesbit*, 10 How. 395.

² *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559.

³ *Portland & O. C. R. Co. v. Grand Trunk R. Co.*, 46 Me. 69.

⁴ *Louisville & O. Tump. Road Co. v. Ballard*, 2 Met. (Ky.) 165; *McElrath v. Pittsburg & S. R. Co.*, 55 Pa. St. 189. See *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141; *Mendenhall v. West Chester & P. R. Co.*, 36 Pa. St. 145, note.

⁵ *Boston, C., & M. R. Co. v. State*, 32 N. H. 215; *South Western R. Co. v. Paulk*, 24 Ga. 356; *Louisville & N. R. Co. v. Burke*, 6 Cold. 45.

⁶ *Ditberner v. Chicago, M., & St. P. R. Co.*, 47 Wis. 138. But see *Deppe v. Chicago, R. I., & P. R. Co.*, 36 Iowa, 52.

⁷ *Camden & A. R. & T. Co. v. Briggs*, 2 Zab. 623.

⁸ *Lawrence R. Co. v. Com'rs*, 35 Ohio St. 1; *Girtman v. Central R. & B. Co.*, 1 Ga. 173.

⁹ *Covington v. Covington & C. B. Co.*, 10 Bush, 69.

¹⁰ *New York & O. M. R. Co. v. Van Horn*, 57 N. Y. 473.

and nothing passes to the grantee beyond what is required by its terms. The State is not presumed, by granting a charter, to pledge itself to one company not to authorize subsequent enterprises which by competition may seriously impair or even destroy the value of the earlier grant. This principle was expounded in a celebrated cause,¹ and is deeply laid in constitutional law. Thus, unless the grant is in terms exclusive, a turnpike franchise is not protected against another turnpike;² or a bridge franchise against another bridge,³ or against a ferry;⁴ or a ferry franchise against another ferry,⁵ or against a bridge.⁶

On this principle a railroad may be authorized which by the diversion of travel will materially lessen, or even destroy, the profits of a turnpike,⁷ canal,⁸ toll-bridge,⁹ plank-road,¹⁰ or of an existing railroad company,¹¹ where the earlier investments are not protected by grants of an exclusive privilege; and the proprietors of the earlier enterprises are not entitled to compensation under the constitutional restriction imposed on the right of eminent domain.¹² The grant of a right to use a certain part of a street for a railway does not divest the State of its power to grant similar rights to other companies to use other portions of the same street for the same purpose.¹³

Express Grants of Exclusive Rights.—The legislature may grant an exclusive right to maintain a railroad within certain limits. The granting of franchises, particularly those which relate to means of internal communication, is an ordinary function of legis-

¹ *Charles River Bridge v. Warren Bridge*, 11 Peters, 419, 6 Pick. 376, 7 Pick. 344.

² *Indian Cañon Road Co. v. Robinson*, 13 Cal. 519; *Bartram v. Central Turnp. Co.*, 25 Cal. 283; *Collins v. Sherman*, 31 Miss. 679.

³ *Charles River Bridge v. Warren Bridge*, 11 Peters, 419; *Oswego Falls Bridge v. Fish*, 1 Barb. Ch. 547; *Hamilton Avenue, In re*, 14 Barb. 405; *Fall v. Sutter County*, 21 Cal. 237.

⁴ *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210.

⁵ *Collins v. Sherman*, 31 Miss. 679; *Fitch v. New Haven, N. L., & S. R. Co.*, 30 Conn. 38; *Wright v. Nagle*, 101 U. S. 791.

⁶ *Richmond & L. Turnp. Road Co. v. Rogers*, 1 Duvall, 135; *McLeod v. Bur-*

roughs, 9 Ga. 213; *Harrison v. Young*, 9 Ga. 359; *Shorter v. Smith*, 9 Ga. 517.

⁷ *Washington & B. Turnp. Road v. Balt. & O. R. Co.*, 10 Gill & J. 392; *Turnpike Co. v. State*, 3 Wall. 210; *White River Turnp. Co. v. Vt. Cent. R. Co.*, 21 Vt. 590.

⁸ *Tuckahoe Canal Co. v. Tuckahoe R. Co.*, 11 Leigh, 42; *Illinois & M. Canal Co. v. Chicago & R. I. R. Co.*, 14 Ill. 314.

⁹ *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch. 625.

¹⁰ *Lafayette Plank Road Co. v. New Albany & S. R. Co.*, 13 Ind. 90.

¹¹ *Baltimore & O. R. Co. v. State*, 45 Md. 596; *Newcastle & R. R. Co. v. Penn. & I. R. Co.*, 3 Ind. 464.

¹² *Ante*, Chap. VII. p. 154.

¹³ *Ante*, Chap. VIII. p. 253.

lative power; and whether they shall be of greater or less extent, exclusive or not, is a matter of legislative discretion. The grant of the exclusive right is a contract the obligation of which a State cannot impair, under the National Constitution, by authorizing another improvement or enterprise in violation of the terms of the grant.¹ The State may, however, take the exclusive right, like other private property, for public use, and upon just compensation being made to the person or corporation enjoying the right, authorize within the limits to which it applies the improvement or enterprise which was expressly provided against in the grant.² Such exclusive grants in favor of bridge,³ wharf,⁴ telegraph,⁵ and railroad⁶ companies have been sustained.

The grant of an exclusive right may be made by reference to the provisions of another act which imports a contract.⁷ It may be made not only in the terms of contract, but as well by the prohibition of a similar enterprise,⁸ either in the charter itself, or even in a general law.⁹

An exclusive grant for a railroad between two places secures the corporation not only against a single railroad running directly between them, but also against a combination of railroads owned by one or more corporations, and pursuing the same or a more circuitous line, which is intended or directly calculated to establish the route prohibited by the grant.¹⁰ Thus, a provision in the charter of the Boston and Lowell Railroad Corporation, "that no other railroad than the one hereby granted shall, within thirty years from and after the passing of this act, be authorized to be made leading from Boston, Charlestown, or Cambridge to any

¹ See cases cited *infra* notes, 3, 4, 5, 6.

² *Ante*, Chap. VII. pp. 153, 154.

³ *Micou v. Tallassee Bridge Co.*, 47 Ala. 652; *Binghamton Bridge Co., In re*, 3 Wall. 51, 27 N. Y. 87; *Chenango Bridge Co. v. Lewis*, 63 Barb. 111; *Bridge Co. v. Hoboken Co.*, 1 Wall. 116, 2 Beas. 81, 503.

⁴ *Martin v. O'Brien*, 34 Miss. 21.

⁵ *State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.

⁶ *Richmond, F., & P. R. Co. v. Louisiana R. Co.*, 13 How. 71; *Pontchartrain R. Co. v. Orleans Nav. Co.*, 15 La. 404; *Delaware & R. Canal Co. v. Camden & A. R. Co.*, 1 C. E. Green, 321, 3 C. E. Green, 546; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1; *State v. Noyes*,

47 Me. 189, 208; *Camblos v. Phil. & R. R. Co.*, 4 Brewster, 563, 595.

⁷ *Binghamton Bridge Co., In re*, 3 Wall. 51, 27 N. Y. 87.

⁸ *Binghamton Bridge Co., In re*, 3 Wall. 51, 27 N. Y. 87; *Delaware & R. Canal Co. v. Camden & A. R. Co.*, 1 C. E. Green, 321, 3 C. E. Green, 546; *Bridge Co. v. Hoboken Co.*, 2 Beas. 81, 503, 1 Wall. 116.

⁹ *Micou v. Tallassee Bridge*, 47 Ala. 652.

¹⁰ *Pontchartrain R. Co. v. New Orleans & C. R. Co.*, 11 La. An. 253. But see *Michigan Cent. R. Co. v. Mich. S. R. Co.*, 4 Mich. 361. Compare *Penn. R. Co. v. National R. Co.*, 8 C. E. Green, 441.

place within five miles of the northern termination of the railroad hereby authorized to be made," was held to be a contract between the State and the company, that no other railroad from Boston, Charlestown, or Cambridge to Lowell should be lawfully made for thirty years; and it was not competent for the legislature to authorize other corporations by combining their railroads to establish a continuous line of railroad for the transportation of persons and property between Boston and Lowell.¹

Construction of Exclusive Grants.—As grants affecting the public interest only carry what is clearly expressed, the grant of an exclusive franchise for one mode of passage or conveyance does not exclude the right to grant a franchise for another mode. Thus, an exclusive ferry franchise does not protect against the erection of a bridge which withdraws custom from the ferry.² The exclusive right to maintain a toll-bridge or a ferry within certain limits is not infringed by a grant to a railroad company of the right to maintain a bridge or ferry as a part of its line for the purpose of carrying the passengers by the railroad.³ The grant of an exclusive right to maintain a railroad for carrying freight and passengers by steam does not exclude a street railway for carrying only passengers by horse power.⁴ The grant of an exclusive right to a railroad for carrying passengers is not violated by a subsequent grant of a right to maintain a railroad for carrying freight.⁵ Where the purpose of the exclusive grant, as inferred from its terms, is to protect *through* traffic between certain places from competition, it will not exclude grants for enterprises which will compete between intermediate points.⁶ The exclusive right to

¹ *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1.

² *Parrott v. City of Lawrence*, 2 Dill. 332; *Piatt v. Covington & C. Bridge Co.*, 8 Bush, 81; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35, 59.

³ *Mohawk Bridge v. Utica & S. R. Co.*, 6 Paige, 554; *Bridge Co. v. Hoboken Co.*, 1 Wall. 116, 2 Beas. 81, 503; *New York v. New England Transfer Co.*, 14 Blatch. 159; *McLeod v. Savannah, A., & G. R. Co.*, 25 Ga. 445, 719; *McRee v. Wil. & R. R. Co.*, 2 Jones (N. C.), 186; *Lake v. Virginia & T. R. Co.*, 7 Nev. 294. *Contra*, *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*,

17 Conn. 40, 454. See *Fitch v. New Haven, N. L., & S. R. Co.*, 30 Conn. 38; *Gifford v. New Jersey R. & T. Co.*, 2 Stock. 171.

⁴ *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duvall (Ky.), 175.

⁵ *Richmond, F., & P. R. Co. v. Louisa R. Co.*, 13 How. 77.

⁶ *Pontchartrain R. Co. v. New Orleans & C. R. Co.*, 11 La. An. 253. See *Raritan & D. B. R. Co. v. Del. & R. Canal Co.*, 1 C. E. Green, 321, 3 C. E. Green, 546, 1 McCarter, 445, 2 McCarter, 13; *South Carolina R. Co. v. Columbia & A. R. Co.*, 13 Rich. Eq. 339; *Richmond, F., & P. R. Co. v. Louisa R. Co.*, 13 How. 71.

carry goods and persons to a place does not give the right to carry them through it.¹

The provision in the charter of the Boston and Lowell Railroad Corporation, before cited, was held not to be infringed by an act authorizing the construction of a railroad from Boston to a point not within five miles of Lowell, although within the space included by two straight lines drawn from the first terminus to points five miles on each side of the other.² The grant of an exclusive right to build a railroad between a city and another point is to be construed with reference to the limits of the city at the time the grant was made, so as not to exclude a railroad running to a part of the city not then included within its limits.³

The right to build and use a railroad for the public use being a franchise, the right to which can be derived from the State only, such franchise, it has been held, is exclusive except against the government, and entitled to protection against competing roads made without legislative authority.⁴ So the right of a company to protection against a competing line, in the absence of a grant of an exclusive privilege, has been maintained against companies undertaking without legislative authority to form such a line by connections.⁵

The power of the legislature to repeal the charter, and the conditions under which the exercise of the power is subject to judicial revision, have been referred to in an earlier chapter.⁶

Reserved Power to amend and repeal the Charter.—The State may reserve the power to amend or repeal the charter by a provision to that effect inserted therein, or in a general law, statutory or constitutional; and the reserved power is thus made a part of the contract. The general law containing the reservation operates, without being specially referred to, on all charters accepted after it took effect.⁷

¹ *Macon v. Macon & W. R. Co.*, 7 Ga. 221.

² *Boston & L. R. Co. v. Boston & M. R.*, 5 Cush. 375.

³ *Pontchartrain R. Co. v. Lafayette & P. R. Co.*, 10 La. An. 741.

⁴ *Raritan & Del. B. R. Co. v. Del. & R. Canal Co.*, 3 C. E. Green, 546; 1 C. E. Green, 321; 1 McCarter, 445; 2 McCarter, 13; *Erie R. Co. v. Del., L., & W. R. Co.*, 6 C. E. Green, 283, 286; *Penn. R. Co. v.*

National R. Co., 8 C. E. Green, 441; *Central R. Co. v. Penn. R. Co.*, 4 Stewart (N. J.), 475, 493, 5 Stewart (N. J.), 755; *Blake v. Winona & St. P. R. Co.*, 19 Minn. 418.

⁵ *Raritan & D. B. R. Co. v. Del. & R. Canal Co.*, 3 C. E. Green, 546; *Penn. R. Co. v. National R. Co.*, 8 C. E. Green, 441.

⁶ *Ante*, Chap. I. p. 9.

⁷ *Stone v. Wisconsin*, 94 U. S. 181, 35 Wis. 425; *Peik v. Chicago & N. W. R.*

The State may, by virtue of such reserved power, at least make any reasonable amendments of the charter, and impose any reasonable additional duties and obligations on the corporation.¹ "The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State."²

The State may, by virtue of the reservation, impose without compensation further duties and expenses on the company at the crossings of highways by its railroad, such as the duty to raise or lower the grade of the highway so as to prevent crossings at grade, to maintain, widen, and repair bridges over them, make excavations, and adapt the track and grade to new highways;³ or require the company to connect with other railroads, and make the changes by way of new grades and tracks necessary for the connection, and determine how the work shall be done, and the expense borne;⁴ regulate grade crossings of other railroads;⁵ authorize one corporation to use the location of another, and prescribe the conditions of such use, and the mode of determining the compensation;⁶ require corporations to establish stations with suitable buildings, and stop trains at them,⁷ and unite together in building and occupying union stations with necessary connecting tracks, and to share in the expense in a proportion to be determined under the statute.⁸ It may require the company

Co., 94 U. S. 164, 6 Biss. 177; *Miller v. State*, 15 Wall. 478, 497; *Delaware R. Co. v. Tharp*, 5 Harring. (Del.) 454; *Story v. Jersey City & B. P. Road Co.*, 1 C. E. Green, 18; *State v. Commissioners*, 8 Vroom, 228, 9 Vroom, 472; *State v. Northern Cent. R. Co.* 44 Md. 131. See a peculiar construction of a reserving statute in *Yeaton v. Bank of Old Dominion*, 21 Gratt. 593.

¹ *Shields v. Ohio*, 95 U. S. 319, 324; *Parker v. Metropolitan R. Co.*, 109 Mass. 506, 508; *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, 451, 15 Wall. 500; *Mass. General Hospital v. State Mutual Life Ass. Co.*, 4 Gray, 227.

² *Tomlinson v. Jessup*, 15 Wall. 454, 459; *Miller v. State*, 15 Wall. 478, 498.

³ *Roxbury v. Boston & P. R. Co.*, 6 Cush. 424; *White v. Quincy*, 97 Mass. 430; *English v. New Haven & N. Co.*, 32

Conn. 240; *Bangor & M. O. R. Co. v. Smith*, 47 Me. 34; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 345 (overruling *Miller v. New York & E. R. Co.*, 21 Barb. 513); *People v. Boston & A. R. Co.*, 70 N. Y. 569.

⁴ *Fitchburg R. Co. v. Grand Junction R. Co.*, 4 Allen, 198.

⁵ *Pittsburg & C. R. Co. v. Southwest Penn. R. Co.*, 77 Pa. St. 173.

⁶ *Worcester & N. R. Co. v. Railroad Com'rs*, 118 Mass. 561; *Metropolitan R. Co. v. Highland St. R. Co.*, 118 Mass. 290; *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen, 262; *Vermont & M. R. Co. v. Fitchburg R. Co.*, 9 Cush. 369.

⁷ *Commonwealth v. Eastern R. Co.*, 103 Mass. 254; *State v. New Haven & N. Co.*, 43 Conn. 351, 44 Conn. 376.

⁸ *Worcester v. Norwich & W. R. Co.*, 109 Mass. 103; *Shields v. Ohio*, 95 U. S. 319, 325.

to discontinue the use of steam power in cities,¹ to construct cattle-guards at highway crossings,² and to maintain fences along its line with a liability for cattle injured by its trains in consequence of its omission to maintain them.³

It may impose a personal liability on stockholders for the debts of the corporation, or otherwise increase their liability;⁴ require the corporation to pay consequential damages to land-owners;⁵ impose on it liability for damages by fire communicated by its engines, irrespective of its negligence;⁶ diminish or increase the power of different classes of stockholders in voting;⁷ require the company to establish a sinking fund, and deposit the same in the public treasury;⁸ and consolidate corporations without the consent of the stockholders.⁹

It may take away or modify the power of municipal bodies to aid the corporation by a subscription to its capital stock;¹⁰ repeal exemptions from taxation, or impose rates higher than or different from those contained in the charter;¹¹ limit and regulate charges for transportation;¹² make or authorize changes in the

¹ *Buffalo & N. F. R. Co. v. Buffalo*, 5 Hill, 209.

² *Bulkley v. New York & N. H. R. Co.*, 27 Conn. 479.

³ *Jeffersonville R. Co. v. Gabbert*, 25 Ind. 431.

⁴ *Oliver Lee's Bank, In re*, 21 N. Y. 9; *Bailey v. Hollister*, 26 N. Y. 112; *Sherman v. Smith*, 1 Black, 587; *South Meadow Dam Co. v. Gray*, 30 Me. 547. But see *Ireland v. Palestine B. N. P. & N. W. Turnp. Co.*, 19 Ohio St. 369. Such a statute as to debts subsequently contracted has been held constitutional even when there was no reserved power. *Coffin v. Rich*, 45 Me. 507. A repeal of the personal liability of stockholders is not valid as to the debts of the company contracted before the repeal. *Hawthorne v. Calef*, 2 Wall. 10.

⁵ *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379.

⁶ *Lyman v. Boston & W. R. Co.*, 4 Cush. 288. The opinion, however, does not refer to the reserving act of March 11, 1831, which preceded the charter. See *White v. Quincy*, 97 Mass. 430, 433.

⁷ *Miller v. State*, 15 Wall. 478; *People v. Hills*, 46 Barb. 341; *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56. But see *Sage v. Dillard*, 15 B. Mon. 340, as to

increasing the number of trustees of an eleemosynary body.

⁸ *Union Pacific R. Co. v. United States*, 99 U. S. 700.

⁹ *Bishop v. Brainerd*, 28 Conn. 289.

¹⁰ *Cumberland & O. R. Co. v. Barren County*, 10 Bush, 604.

¹¹ *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 528; *State v. Person*, 3 Vroom, 134; *Iron City Bank v. Pittsburg*, 37 Pa. St. 340; *Commonwealth v. Fayette County R. Co.*, 55 Pa. St. 452; *Union Improvement Co. v. Commonwealth*, 69 Pa. St. 140; *West Wisconsin R. Co. v. Board of Supervisors*, 35 Wis. 257. See *Scotland County v. Mo., I., & N. R. Co.*, 65 Mo. 123.

¹² *Parker v. Metropolitan R. Co.*, 109 Mass. 506; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 6 Biss. 177; *Stone v. Wisconsin*, 94 U. S. 181; *Shields v. Ohio*, 95 U. S. 319; *American Coal Co. v. Consolidation Coal Co.*, 46 Md. 15; *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559. Where it has reserved the power to authorize other corporations to use the location of a company on payment of tolls, it may provide a mode for fixing the tolls. *Vermont & M. R. Co. v. Fitchburg R. Co.*, 9 Cush. 369.

enterprise which will bind dissenting stockholders and subscribers, as by new locations, extensions, branches, sales, purchases, and leases of railroads, and consolidations with other companies.¹

Limitations of the Power. — The reserved power to amend, alter, or repeal the charter has been generally treated as a power subject to limitations founded in reason and justice. While it authorizes alterations of the charter which keep the original purpose in view, and the imposition of duties required by the public convenience and welfare, it ought not to sanction a reckless invasion of the rights of property, or a revolution in the character and objects of the corporation. The property of the corporation is still protected from being taken for public uses without just compensation being made therefor. The government may exercise its reserved power; but it cannot take what it did not give, to wit, the private property of the corporation, except in the exercise of the right of eminent domain.² The power should be confined to reasonable amendments regulating the mode of using and enjoying the franchise granted, which do not defeat or essentially impair the object of the grant, or take away any property or rights which have become vested under a legitimate exercise of the powers granted, or abrogate contracts which have been lawfully made under the charter.³

The power cannot be used to convert a conditional contract

¹ *Durfee v. Old Colony & F. R. R. Co.*, 5 Allen, 230; *Story v. Jersey City Plank Road Co.*, 1 C. E. Green, 13; *Pacific R. Co. v. Renshaw*, 18 Mo. 210; *Schenectady & S. Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56; *Mowrey v. Indianapolis & C. R. Co.*, 4 Biss. 78; *ante*, Chap. III. pp. 71, 72; *contra*, *Zabriskie v. Hackensack & N. Y. R. Co.*, 3 C. E. Green, 178.

² *White v. Syracuse & U. R. Co.*, 14 Barb. 559, 560; *People v. Boston & A. R. Co.*, 70 N. Y. 569; *Pacific R. Co. v. Renshaw*, 18 Mo. 210, 216. "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted

under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions, and are as inviolable as in other cases." *Shields v. Ohio*, 95 U. S. 319, 324, *Swayne, J.*

³ *Parker v. Metropolitan R. Co.*, 109 Mass. 506, 508; *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446, 451, 15 Wall. 500, 519, 522; *Commonwealth v. Essex Co.*, 13 Gray, 239, 253; *Durfee v. Old Colony & F. R. Co.*, 5 Allen, 230; *Tomlinson v. Jessup*, 15 Wall. 454, 459; *Miller v. State*, 15 Wall. 478, 498; *Stone v. Wisconsin*, 94 U. S. 181, 186; *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 528; *Belfast & M. L. R. Co. v. Moore*, 60 Me. 561, 567; *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56, 70.

between the corporation and the subscribers into an absolute contract;¹ or to impose burdens merely for the benefit of individuals where no public interests are concerned;² or, it has been held, to require the corporation, after it has made compensation for an interference with private rights, to furnish additional means for preventing injuries to them.³ The power, however, has at least the effect to give a control over corporations as wide as that which may be exercised over individuals.⁴

Certain legislative interferences with corporations, which are by some authorities referred to the reserved power to amend the charter, are by others referred to the police power; and interferences of the same character are sometimes referred to both powers.

Corporations subject to Police Laws.—A railroad company, although no power is reserved to amend or repeal its charter, is nevertheless subject, like individuals, to such police laws as the legislature may from time to time enact for the safety and health of citizens and the general convenience and good order. Its property and essential franchises are, indeed, protected by the Constitution; but the company itself is not thereby placed above the laws. It was not the design of that instrument to disarm the States of the power to pass laws to protect the lives, limbs, health, and morals of citizens, and to regulate their conduct towards each other, and the mode of using property so that different owners may not injure each other. Such laws may incidentally impair the value of franchises, or of rights held under contracts, but they are enacted *diverso intuitu*, and are not within the constitutional inhibition.⁵

¹ *Oldtown & L. R. Co. v. Veazie*, 39 Me. 571; *Miller v. State*, 15 Wall. 478, 498. See *Zabriskie v. Hackensack & N. Y. R. Co.*, 3 C. E. Green, 178.

² *Commonwealth v. Eastern R. Co.*, 103 Mass. 254, 258; *Milliman v. Oswego & S. R. Co.*, 10 Barb. 87.

³ *Commonwealth v. Essex Co.*, 13 Gray, 239. In this case it was held, notwithstanding the reservation, that a company which had paid damages for fish-rights could not afterwards be required to make different fish-ways. It is difficult to reconcile this case with the later one of *Commissioners on Inland Fisheries v. Holyoke W. Co.*, 104 Mass. 446, 15 Wall. 500, al-

though the State court suggests distinctions. See *Commonwealth v. Penn. Canal Co.*, 66 Pa. St. 41.

⁴ *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 176.

⁵ *Vanderbilt v. Adams*, 7 Cowen, 349; *Coates v. New York*, 7 Cowen, 585; *Baker v. Boston*, 12 Pick. 184, 194; *Commonwealth v. Alger*, 7 Cush. 53; *Sohier v. Trinity Church*, 109 Mass. 1; *Watertown v. Mayo*, 109 Mass. 315; *Woodlawn Cemetery v. Everett*, 118 Mass. 354; *Gibbons v. Ogden*, 9 Wheat. 1, 203; *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 568; *Beer Co. v. Massachusetts*, 97 U. S. 25, 115 Mass. 153; *Fertilizing Co. v. Hyde Park*,

The term *police* is perhaps a term of too limited application to designate the general power which exists in the State to control and regulate a corporation in the same manner as a natural person, and to define its relations to the public.¹ Generally the

97 U. S. 659; *Stone v. Mississippi*, 101 U. S. 814; *Richmond, F., & P. R. Co. v. Richmond*, 26 Gratt. 83.

¹ *Nelson v. Vt. & C. R. Co.*, 26 Vt. 717; *Branin v. Conn. & P. R. R. Co.*, 31 Vt. 214, 222; *Middlesex R. Co. v. Wakefield*, 103 Mass. 261; *Commonwealth v. Essex Co.*, 13 Gray, 239, 247; *Commonwealth v. Tewksbury*, 11 Met. 55; *State v. New Haven & N. Co.*, 43 Conn. 351, 378, 379; *Boston, C. & M. R. Co. v. State*, 32 N. H. 215, 225; *State v. Southern Pacific R. Co.*, 24 Tex. 80; *People v. Boston & A. R. Co.*, 70 N. Y. 569; *Frankford & P. Pass. R. Co. v. Philadelphia*, 58 Pa. St. 119; *Richmond, F., & P. R. Co. v. Richmond*, 96 U. S. 521, 26 Gratt. 83, 95; *Kansas Pacific R. Co. v. Mower*, 16 Kan. 573; *Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; *Ruggles v. People*, 91 Ill. 256; *Lake Shore & M. S. R. Co. v. Cincinnati, S., & C. R. Co.*, 30 Ohio St. 604; *State v. Columbus Gas Light & C. Co.*, 34 Ohio St. 572; 8 Am. Law Rev. (Jan. 1874) p. 236. In *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, a leading case, Redfield, C. J., said: "The police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim, *Sic utere tuo ut alienum non lædas*, which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. So far as railroads are concerned, this police power, which resides primarily and ultimately in the legislature, is twofold: 1. The police of the roads, which, in the absence of legislative control, the corporations themselves exercise over their operatives, and to some extent over all who do business with them, or come upon their grounds, through their general statutes and by their officers. We apprehend there can be no manner of doubt that the legislature may, if they deem the public good requires it, — of which they are to judge, and in all doubtful cases their

judgment is final, — require the several railroads in the State to establish and maintain the same kind of police which is now observed upon some of the more important roads in the country for their own security, or even such a police as is found upon the English railways and those upon the continent of Europe. No one ever questioned the right of the Connecticut legislature to require trains upon all their railroads to come to a stand before passing draws on bridges; or of the Massachusetts legislature to require the same thing before passing another railroad. And by parity of reason may all railroads be required so to conduct themselves, as to other persons, natural or corporate, as not unreasonably to injure them or their property. And if the business of railways is specially dangerous, they may be required to bear the expense of erecting such safeguards as will render it ordinarily safe to others, as is often required of natural persons under such circumstances. There would be no end of illustrations upon this subject, which in the detail are more familiar to others than to us. It may be extended to the supervision of the tracks, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety-beams in case of the breaking of axle-trees, the number of brakemen upon a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed, and a thousand similar things, most of which have been made the subject of legislation or judicial determination, and all of which may be. *Hegeman v. Western R. R. Co.*, 16 Barbour, 353.

"2. There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right in the legislature to do which no question

power of the State legislature is restricted only by the limitations contained in the State and National Constitutions.¹

Such acts imposing police regulations are usually construed as applying to existing corporations as well as to those afterwards created.² They may be applied to some common carriers and not to others, and to some railroad companies and not to others,³ and they may take away an exemption from a general police law which was allowed by the charter.⁴

The State may in the exercise of its police power require reports,⁵ the numbering of cars,⁶ the fixing and posting of rates,⁷ a slow rate of movement,⁸ the disuse of steam in cities,⁹ the ringing of a bell and blowing of a whistle on approaching highways,¹⁰ the stationing of a flagman at a highway crossing,¹¹ the lighting of the railroad in cities and villages,¹² the stopping of trains for a certain time at stations,¹³ and affix penalties or a liability for injuries in case of non-compliance.

ever was, or upon acknowledged general principles ever can be, made so far as natural persons are concerned. And it is certainly calculated to excite surprise and alarm, that the right to do the same with regard to railways should be made a serious question."

¹ *Fry v. State*, 63 Ind. 552, 559; *State v. Columbus Gas Light & C. Co.*, 34 Ohio St. 572; *Munn v. Illinois*, 94 U. S. 113, 124; *Cairo & St. L. R. Co. v. Warrington*, 92 Ill. 157.

² *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548; *Western Union R. Co. v. Fulton*, 64 Ill. 271; *Wilder v. Maine Cent. R. Co.*, 65 Me. 332; *Portland, S., & P. R. Co. v. Boston & M. R.*, 65 Me. 122; *Pratt v. Atlantic & St. L. R. Co.*, 42 Me. 579; *Norris v. Androscoggin R. Co.*, 39 Me. 273; *Bulkley v. New York & N. H. R. Co.*, 27 Conn. 479; *Pittsburg & C. R. Co. v. Southwest Pa. R. Co.*, 77 Pa. St. 173. See *Veazie v. Mayo*, 49 Me. 156; *Indianapolis & St. L. R. Co. v. Blackman*, 63 Ill. 117. The act is in terms sometimes applied only to railroads thereafter to be constructed. *Stearns v. Old Colony & F. R. R. Co.*, 1 Allen, 493; *Baxter v. Boston & W. R. Co.*, 102 Mass. 383; *Attorney-General v. Ware River R. Co.*, 115 Mass. 400.

³ *Galena & C. U. R. Co. v. Dill*, 22 Ill. 264; *Boston, C., & M. R. Co. v. State*, 32 N. H. 215.

⁴ *Galena & C. U. R. Co. v. Appleby*, 28 Ill. 283.

⁵ *State v. Southern Pacific R. Co.*, 24 Tex. 80.

⁶ *Frankford & P. Pass. R. Co. v. Philadelphia*, 58 Pa. St. 119.

⁷ *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560.

⁸ *Toledo, P., & W. R. Co. v. Deacon*, 63 Ill. 91; *Chicago, R. I., & P. R. Co. v. Reidy*, 66 Ill. 43; *Chicago, B., & Q. R. Co. v. Haggerty*, 67 Ill. 113; *Whitson v. Franklin*, 34 Ind. 392; *Donnaher v. State*, 8 Smedes & M. 649; *Mobile & O. R. Co. v. State*, 51 Miss. 137; *State v. Jersey City*, 5 Dutcher, 170; *Horn v. Chicago & N. W. R. Co.*, 38 Wis. 463; *Haas v. Chicago & N. W. R. Co.*, 41 Wis. 44.

⁹ *Richmond, F., & P. R. Co. v. Richmond*, 96 U. S. 521, 26 Gratt. 83; *Donnaher v. State*, 8 Smedes & M. 649; *Atlantic & P. R. Co. v. St. Louis*, 3 Mo. App. 315, 66 Mo. 228.

¹⁰ *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548; *Galena & C. U. R. Co. v. Appleby*, 28 Ill. 283; *Western Union R. Co. v. Fulton*, 64 Ill. 271; *Pittsburg, C., & St. L. R. Co. v. Brown*, 67 Ind. 45.

¹¹ *State v. East Orange*, 12 Vroom, 127; *Toledo, W., & W. R. Co. v. Jacksonville*, 67 Ill. 37.

¹² *Cincinnati, H., & D. R. Co. v. Sullivan*, 32 Ohio St. 152.

¹³ *Davidson v. State*, 4 Tex. Ct. App.

It may regulate the use of highways by a railroad company, requiring it to cross them in a certain manner,¹ and prohibiting it from laying its tracks on the highway within a certain distance from the station of another company.² It may regulate the use of highways by a street-railroad company;³ and it retains its right to make alterations in public ways and bridges, which may even be an inconvenience to the company.⁴ It may regulate the crossings of other railroads at grade.⁵

It may require the company to maintain fences along the sides of its track, and impose a liability for injuries to cattle caused by its omission to maintain them; and the requirement has been considered to have reference as well to the safety of travellers by the railroad as to the protection of the cattle of land-owners.⁶ A provision in the charter requiring certain fences does not conclude the State from subsequently requiring other and different safeguards.⁷ The company may be made liable in double the amount of damages sustained by owners of cattle in consequence of its neglect to comply with the statute.⁸ But a statute imposing an absolute liability on the company for injuries to cattle without any negligence or breach of duty has been held unconstitutional, as depriving it of its property "without due process of law."⁹

545; *Galveston, H., & S. A. R. Co. v. Le Gierse*, 51 Tex. 189.

¹ *Veazie v. Mayo*, 45 Me. 560; *Pittsburg & C. R. Co. v. Southwest Penn. R. Co.*, 77 Pa. St. 173.

² *Portland, S., & P. R. Co. v. Boston & M. R.*, 65 Me. 122.

³ *Union R. Co. v. Cambridge*, 11 Allen, 287.

⁴ *Middlesex R. Co. v. Wakefield*, 103 Mass. 261; *Commonwealth v. Essex Co.*, 13 Gray, 239, 247.

⁵ *Pittsburg & C. R. Co. v. Southwest Penn. R. Co.*, 77 Pa. St. 173; *Lake Shore & M. S. R. Co. v. Cincinnati, S., & C. R. Co.*, 30 Ohio St. 604.

⁶ *Nelson v. Vt. & C. R. Co.*, 26 Vt. 717; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140; *Norris v. Androscoggin R. Co.*, 39 Me. 273; *Wilder v. Maine Cent. R. Co.*, 65 Me. 332; *Suydam v. Moore*, 8 Barb. 358; *Waldron v. Rensselaer & S. R. Co.*, 8 Barb. 390; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Madison & I. R. Co. v. Whiteneck*, 8 Ind. 217; *New Albany & S. R. Co. v. Tilton*, 12 Ind. 3; *Indianapolis &*

C. R. Co. v. Kercheval, 16 Ind. 84; *Jeffersonville R. Co. v. Gabbert*, 25 Ind. 431; *Kansas Pacific R. Co. v. Mower*, 16 Kan. 573; *Gorman v. Pacific R. Co.*, 26 Mo. 441; *Trice v. Han. & St. J. R. Co.*, 49 Mo. 438; *Blair v. Mil. & P. R. Co.*, 20 Wis. 254; *Jones v. Galena & C. U. R. Co.*, 16 Iowa, 6; *Penn. R. Co. v. Riblet*, 66 Pa. St. 164.

⁷ *Gillam v. Sioux City & St. P. R. Co.*, 9 Reporter, 375.

⁸ *Cairo & St. L. R. Co. v. Peoples*, 92 Ill. 97; *Cairo & St. L. R. Co. v. Warrington*, 92 Ill. 157; *Jones v. Galena & C. U. R. Co.*, 16 Iowa, 6; *Tredway v. Sioux City & St. P. R. Co.*, 43 Iowa, 527, 39 Iowa, 663; *Mackie v. Central R. Co.*, 6 Northwest. Rep. 723; *Kaes v. Mo. Pacific R. Co.*, 6 Mo. App. 397; *L. R. & F. S. R. Co. v. Payne*, 33 Ark. 816. But see *Atchison & N. R. Co. v. Baty*, 6 Neb. 37.

⁹ *Zeigler v. South & N. A. R. Co.*, 58 Ala. 594; *Memphis & C. R. Co. v. Lyon*, 62 Ala. 71. But see *Kansas Pacific R. Co. v. Mower*, 16 Kan. 573; *Hopkins v. Kansas Pacific R. Co.*, 18 Kan. 462; *Atch-*

Other regulations, which concern the general welfare, though not police in a strict sense, have been sustained; such as prohibiting the company from limiting its liability as a common carrier by special contract;¹ making it liable for the wages of laborers on the railroad who are employed by a contractor and not by the company;² requiring it to build stations at places designated by the legislature or by some board,³ or to construct bridges at highway crossings;⁴ imposing on it a liability for injuries by fire communicated from its engines with or without negligence on its part,⁵ and for injuries to servants committed by fellow-servants, although not imposing such liability on other employers;⁶ and limiting the right to sell passenger tickets to agents who have a written authority from the company.⁷

The police power is by some authorities restricted to regulations which immediately concern the public safety, order, health, morals, and comfort. In this view, the State cannot, under color of this power, impair the franchise or rights essential to it,⁸ or impose on the corporation new and additional duties or burdens not imposed on natural persons,⁹ or contemplated by the charter.¹⁰ Thus the power has been held, by a narrow construction, not to extend to the imposition of duties and burdens for the public convenience only, where not required for safety; such as the stopping of trains for a certain time at the crossings of the rail-

ison & N. R. Co. *v.* Harper, 19 Kan. 529.

¹ Mobile & O. R. Co. *v.* Franks, 41 Miss. 494.

² Branin *v.* Conn. & P. R. R. Co., 31 Vt. 214; Peters *v.* St. Louis & I. M. R. Co., 23 Mo. 107; Kent *v.* New York Cent. R. Co., 12 N. Y. 628; Hart *v.* Boston, R. B., & L. R. Co., 121 Mass. 510. Such a statute is held not to apply to contracts with a contractor made prior to its passage. Parker *v.* Massachusetts R. Co., 115 Mass. 580.

³ Railroad Com'rs *v.* Portland & O. C. R. Co., 63 Me. 269.

⁴ People *v.* Boston & A. R. Co., 70 N. Y. 569.

⁵ Pratt *v.* Atlantic & St. L. R. Co., 42 Me. 579; Stearns *v.* Atlantic & St. L. R. Co., 46 Me. 95; Kansas Pacific R. Co. *v.* Mower, 16 Kan. 573, 580; Lyman *v.* Boston & W. R. Co., 4 Cush. 288.

⁶ Ditberner *v.* Chicago, M., & St. P. R. Co., 47 Wis. 138.

⁷ Fry *v.* State, 63 Ind. 552; Commonwealth *v.* Wilson, 37 Leg. Int. 484.

⁸ Phil., W., & B. R. Co. *v.* Bowers, 4 Houst. 506; Beer Co. *v.* Massachusetts, 97 U. S. 25. "The limit to the exercise of the police power in these cases must be this: the regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretence of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise." Cooley's Const. Lim. [* 577].

⁹ Illinois Cent. R. Co. *v.* Bloomington, 76 Ill. 447; Commonwealth *v.* Penn. Canal Co., 66 Pa. St. 41.

¹⁰ Commonwealth *v.* New Bedford Bridge, 2 Gray, 339.

roads of other corporations, in order to receive passengers arriving by such railroads,¹ or the building of crossings for highways laid out after the construction of the railroad;² and still more, to the imposition of burdens of mere private interest and concern, not required by the general security and convenience, such as the construction of farm crossings, the cost of which has in legal presumption been paid to the land-owner as a part of the damages awarded to him.³

Other authorities, however, as has been seen,⁴ — and they express the present tendency of the law, — while disclaiming that the police power extends to the control of rights purely and exclusively private, give it a very wide scope, comprehending within it the general powers of sovereignty to govern men and things; that is to say, the power to regulate, at discretion, for the public good, the conduct of citizens (including corporations) towards each other, and their use of their property, in order to give effect to the fundamental rule of social conduct, *sic utere tuo ut alienum non lædas*.⁵

¹ *State v. Noyes*, 47 Me. 189; *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269, 285, 286.

² *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447; *City of Erie v. Erie Canal Co.*, 59 Pa. St. 174. See *Veazie v. Mayo*, 49 Me. 156.

³ *Milliman v. Oswego & S. R. Co.*, 10 Barb. 87; *Marsh v. New York & E. R. Co.*, 14 Barb. 364, 370; *Tombs v. Rochester & S. R. Co.*, 18 Barb. 583; *Underhill v. New York & H. R. Co.*, 21 Barb. 489; *Nelson v. Vt. & C. R. Co.*, 26 Vt. 717. But *contra*, *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 153.

⁴ *Ante*, pp. 461–463.

⁵ *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, *ante*, p. 461, *note*; *Munn v. Illinois*, 94 U. S. 113, 124, 125. Waite, C. J.: “When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. ‘A body politic,’ as aptly defined in the preamble of the Constitution of Massachusetts, ‘is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.’ This

does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. R. & B. Railroad Co.*, 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, ‘are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.’ Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommoda-

Power to limit Rates and Charges of Transportation.—The police power, so far as regulating rates for transportation is concerned, has been sometimes limited to the prohibition of *unreasonable* charges and discriminations, leaving to the courts to decide, as a judicial question, what charges and discriminations are of that character.¹ Thus, while discriminations in favor of competing and against non-competing points may be prohibited, the State cannot, by an arbitrary rule applied to all cases, prohibit different charges for the same distances, such variations being proper under some circumstances; but the decision, whether the discrimination is reasonable or not, remains with the judiciary.²

The contention, as to the right of the State to regulate and limit the charges of railroad corporations and warehousemen as common carriers has led to a broad definition of the police power. The national tribunal of last resort has held, though with strenuous dissent, that the legislature may, unless restrained by some contract between the State and the corporation, regulate and limit such charges without judicial action determining whether the limit is reasonable or not; and that such legislation is not prohibited by the fourteenth amendment of the Constitution, which ordains that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."³

tions furnished, and articles sold. To this day statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." See to the same effect, *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 471.

¹ *Phil., W., & B. R. Co. v. Bowers*, 4 Houst. 506; *Sloan v. Pacific R. Co.*, 61 Mo. 24; *Ladd v. Southern Cotton Press & M. Co.*, 12 Chicago Leg. News, 418, 10 Reporter, 186. But *contra* decisions in U. S. Supreme Court. *Munn v. Illinois*, 94 U. S. 113, 133; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 178.

² *Chicago & A. R. Co. v. People*, 67 Ill. 11. In *Toledo, W., & W. R. Co. v. Jacksonville*, 67 Ill. 37, it was held that the State may impose other reasonable regulations, as at highway crossings; but the

final decision upon their character and validity is with the courts.

³ *Munn v. Illinois*, 94 U. S. 113; *Chicago, B., & Q. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 6 Biss. 177; *Chicago, M., & St. P. R. Co. v. Ackley*, 94 U. S. 179; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 19 Minn. 434; *Stone v. Wisconsin*, 94 U. S. 181; *Union Pacific R. Co. v. United States*, 99 U. S. 700, 719. For decisions to the same effect in State courts see *Attorney-General v. Railroad Cos.*, 35 Wis. 425; *Hinckley v. Chicago, M., & St. P. R. Co.*, 38 Wis. 194; *State v. Winona & St. P. R. Co.*, 19 Minn. 434; *Cincinnati, H., & D. R. Co. v. Cole*, 29 Ohio St. 126; *Iron R. Co. v. Lawrence Furnace Co.*, 29 Ohio St. 208; *State v. Columbus Gas Light & C. Co.*, 34 Ohio St. 572; *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559; *Ruggles v. People*, 91 Ill. 256; *Illinois Cent. R. Co. v. People*, 95 Ill. 318. The statute was held also

The court, after declaring the governments of the States to possess all the powers of the British Parliament, except as limited by the State or National Constitution, held that the power to control the use of property included, and was limited to, property "clothed" or "affected with a public interest;" and that property is so clothed and affected when it is "used in a manner to make it of public consequence, and affect the community at large,"—giving, as illustrations of persons so using property, common carriers, wharfingers, ferrymen, inn-keepers, millers, and bakers. The power of legislative control over property, if existing to the extent stated by the court, must be universal; and the limitation suggested seems too indefinite as a rule of constitutional construction.¹

not to be prohibited by § 8, art. 1, which gives power to Congress to regulate commerce between the States and with foreign nations, or by § 9, art. 1, which prohibits preferences to the ports of one State over those of another, a provision which restricts only the national government. *Munn v. Illinois*, 94 U. S. 113. For construction of an act as to rates, see *Hersh v. Northern Cent. R. Co.*, 74 Pa. St. 181. The act of Wisconsin of 1873, known as "The Potter Law," was repealed in 1876. *Rood v. Chicago, M., & St. P. R. Co.*, 43 Wis. 146; *Smith v. Chicago & N. W. R. Co.*, 43 Wis. 686.

¹ *Munn v. Illinois*, 94 U. S. 113, 125. Waite, C. J.: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in

that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." . . . "In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. . . . But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. . . . To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." pp. 133, 134. Field, J., dissenting, stoutly

The power of the State to regulate and limit fares is not restricted by the fact that the income of the corporation has been pledged to the payment of obligations incurred on the faith of the charter.¹

A grant of power in the charter, authorizing the company to fix the rates of tolls, is not a contract which excludes the legislature from regulating and limiting them.²

State Legislation as related to the Power of Congress to regulate Commerce. — The provision of the National Constitution in relation to the commercial power of Congress has given rise to questions in connection with transportation by railroad companies and other carriers which are embarrassed with difficulty. Section eight of article one confers upon Congress the power "to regulate commerce with foreign nations and among the several States." Where the business is solely within the State, no question arises under this provision, as in such case it is purely a matter of State concern. Where it combines commerce, some exclusively within and some without the State, the provision is held not to interdict State regulation acting within the State on both kinds alike, until Congress exercises its constitutional power, which, until exerted, remains in abeyance. The primary object and scope of the regulation is in such case local and domestic, while the extra-territorial effect, being only indirect, is not prohibited so long as the congressional power remains quiescent.³ Whether a State regulation affects inter-state commerce directly so as to be prohibited, or only indirectly so as to be permitted, is often a perplexing inquiry, and it is confessed that the line cannot be clearly drawn by any formula.⁴

rejected the distinction based on the public relations of property, and said: "There is no business or enterprise involving expenditures to any extent which is not of public consequence, and which does not affect the community at large. There is no industry or employment, no trade or manufacture, and no avocation which does not in a greater or less extent affect the community at large, and in which the public has not an interest in the sense used by the court." *Stone v. Wisconsin*, 94 U. S. 181, 185; *Munn v. Illinois*, 94 U. S. 113, 141.

¹ *Chicago, B., & Q. R. Co. v. Iowa*, 94 U. S. 155.

² *Ruggles v. People*, 91 Ill. 256; *Illinois Cent. R. Co. v. People*, 95 Ill. 313.

³ *Munn v. Illinois*, 94 U. S. 113, 135; *Chicago, B., & Q. R. Co. v. Iowa*, 94 U. S. 155, 163; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 178. See *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1. It was held in *Shipper v. Penn. R. Co.*, 47 Pa. St. 338, that the State may discriminate between local and extra-territorial freight.

⁴ *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 472. "Many acts of a State

The State may, in exerting its police power, affect indirectly inter-state commerce, but it cannot, under color of it, assume powers conferred only on Congress, or legislate on subjects committed exclusively to Congress.¹ It may regulate the sale of passenger tickets within the State, although the carrier's line extends into other States.² It may levy taxes on all property, business, and persons within its jurisdiction, although it may thereby increase the cost of transportation and affect indirectly commerce between States.³ Thus, it may tax the net earnings and gross receipts of a company whose road lies in the State, derived in part from merchandise and passengers transported through the State, or from the State into other States, or into the State from other States.⁴ It may exact from a corporation a portion of its earnings as a bonus for its franchise, or require it to pay annually for a license, although it is a means of communication between States.⁵ But it cannot interfere directly with the national jurisdiction over inter-state commerce by levying a capitation tax on passengers carried out of the State, to be collected of the carrier;⁶ or by taxing merchandise itself by the ton, or taxing the carrier on account of the merchandise which is transported through the State, or carried out of it or brought into it.⁷

The State cannot, even in the absence of national legislation, impose a direct tax or burden on inter-state commerce, or inter-

may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences, and that which regulates or furnishes a rule for conduct." Strong, *J. Hall v. De Cuir*, 95 U. S. 485, 488. "The line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs." Waite, *C. J.*

¹ *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 473; *Henderson v. New York*, 92 U. S. 259, 271, 272; *Chy Lung v. Freeman*, 92 U. S. 275; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 471, 472; *Hall v. De Cuir*, 95 U. S. 485, 488. It may require companies doing business within it and between it and other States to fix annually their rates, and post them

at certain places. *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560.

² *Fry v. State*, 63 Ind. 552; *Commonwealth v. Wilson*, 37 Leg. Int. 484.

³ *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319.

⁴ *State Tax on Railway Gross Receipts*, 15 Wall. 284; *State v. American Ex. Co.*, 7 Biss. 227; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *State v. Cumberland & P. R. Co.*, 40 Md. 22.

⁵ *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 34 Md. 344, 45 Md. 596; *Delaware Railroad Tax*, 18 Wall. 206; *Osborne v. Mobile*, 16 Wall. 479.

⁶ *Crandall v. State*, 6 Wall. 35; *Clarke v. Phil., W., & B. R. Co.*, 4 Houst. 158.

⁷ *State Freight Tax*, 15 Wall. 232 (overruling 62 Pa. St. 286). See *Penn. R. Co. v. Commonwealth*, 3 Grant, 128; *Erie R. Co. v. State*, 2 Vroom, 531, 1 Vroom, 473; *State v. Carrigan*, 10 Vroom, 35.

fere directly with its freedom without encroaching on the exclusive domain of Congress; and it cannot enforce regulations wholly inter-state in their character, even in the absence of congressional action.¹ Thus, while it may, under its police power, exclude diseased animals from being brought into its territory, it cannot prohibit the conveyance into the State of cattle, — “Texas, Mexican, or Indian,” — irrespective of their condition, from other States and foreign nations, or impose onerous liabilities on common carriers transporting them through it.² It cannot prohibit carriers on the Mississippi River, engaged in transporting passengers among States, from assigning them to separate cabins with reference to color, even as to passengers whose contract of transportation is to be wholly executed within the State.³ A State cannot require transfers of freight and passengers passing through its limits to be made at a point within the State where such a requirement is in conflict with acts of Congress.⁴ It cannot, in the exercise of the taxing power, impose a more onerous burden on the products of other States brought within its limits than upon like products of its own territory, or discriminate in favor of its own citizens against those of other States.⁵

It has been held that, notwithstanding the exclusive power given to Congress to regulate commerce among the States, a State may regulate the charges of public warehouses and railroads within its limits, although they are used for the purpose of inter-state and international commerce. Their primary character as domestic agencies is not lost when they serve in wider relations. This rule operates not only on property kept or transported exclusively within the State, but also, at least until Congress intervenes, on property while within the State which was brought into or is to be carried out of it.⁶

¹ *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 472.

² *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465. See *Yeazel v. Alexander*, 58 Ill. 254.

³ *Hall v. De Cuir*, 95 U. S. 485 (overruling 27 La. An. 1). See distinction between commerce on land and commerce on water in *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 470.

⁴ *Council Bluffs v. Kansas City, St. J., & C. B. R. Co.*, 45 Iowa, 338.

⁵ *Guy v. Baltimore*, 100 U. S. 434;

Howe Machine Co. v. Gage, 100 U. S. 676.

⁶ *Munn v. Illinois*, 94 U. S. 113, 135; *Chicago, B., & Q. R. Co. v. Iowa*, 94 U. S. 155, 163; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 177; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 471. A statute, requiring in effect a railroad company to transfer within the State freight and passengers destined for places beyond it, was held to conflict with the legislation of Congress (R. S. U. S. §§ 5257, 5258), and therefore void. *Council Bluffs v. Kansas City, St. J., & C. B. R. Co.*, 45 Iowa, 338.

Statutes regulating and limiting rates may classify corporations and vary the rates for different classes, but imposing the same for all in a like situation; and they are not in conflict with State constitutional provisions which require uniformity and equality in general laws.¹

A State cannot give an exclusive right to one corporation to establish a telegraph line which interferes with the legislation of Congress.²

Congress has refrained from exercising its power to regulate commerce among the States by railroads, except to a very limited extent,³ or incidentally, as by declaring railroad bridges across navigable waters to be lawful structures;⁴ and the power has been judicially treated chiefly in decisions upon State legislation alleged to be in conflict with it. Its power to fix rates of transportation between the States, to build or authorize railroads for inter-state commerce, and to prohibit monopolies and discriminations unfriendly to such commerce, has been maintained in State papers and debates in Congress.⁵

¹ Chicago, B., & Q. R. Co. *v.* Iowa, 94 U. S. 155; McAunich *v.* Miss. & M. R. Co., 20 Iowa, 338.

² Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1.

³ Act of June 15, 1866, U. S. Rev. Stat. § 5258, authorizing every railroad company in the United States to carry passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to connect with roads of other States, so as to form continuous lines of transportation.

⁴ Gray *v.* Clinton Bridge, 16 Am. Law

Reg. 149; State *v.* Wheeling & B. Bridge Co., 18 How. 421.

⁵ Debate in U. S. Senate, Feb. 14, 1865, Cong. Globe, 2d Sess. 38th Cong. Part I. pp. 790-795; May 29, 1866, Cong. Globe, 1st Sess. 39th Cong. Part III. pp. 2870-2876; Works of Charles Sumner, vol. ix. p. 237; Report from Committee on Railways and Canals, House Doc. No. 28, 43d Cong. 1st Sess.; Redfield on Railways, vol. i. pp. 719-727; Baltimore & O. R. Co. *v.* Maryland, 21 Wall. 456, 474; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1.

CHAPTER XVIII.

TAXATION.

Property Subject to Taxation. — The power of a State to tax subjects within its jurisdiction — including persons, business, and property — is unlimited, except as restrained by constitutional provisions; but the power does not extend to subjects without its jurisdiction.¹ It extends to foreign as well as domestic corporations, to the extent of the capital stock, property, and business within the State;² and it extends to the property of railroad corporations which is in the possession of mortgagees or receivers.³ The rate and mode of assessment and rules of valuation are matters of legislative discretion,⁴ except when regulated, as they sometimes are, by the State constitution.⁵

The debts owed by a corporation are the property of its creditors, and are taxable to them in the State of their domicile, and there only. A State cannot therefore tax the bonds of a corporation held by non-residents, and require it to withhold the amount of the tax from the interest due to such bondholders; and the rule is the same where the bonds are secured by a mortgage on a railroad within the State. Such legislation is extra-territorial, and also impairs the obligation of the contract between the cor-

¹ *Lane County v. Oregon*, 7 Wall. 71, 77; *Thomson v. Kansas Pacific R. Co.*, 9 Wall. 579, 591; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319; *Union Pacific R. Co. v. Peniston*, 18 Wall. 5, 29; *State Railroad Tax Cases*, 92 U. S. 575, 603; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Porter v. Rockford, R. I., & St. L. R. Co.*, 76 Ill. 561, 573; *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147; *Pittsburg, Ft. W., & C. R. Co. v. Commonwealth*, 3 Brewster, 355. A company may be a railroad company within the meaning of a statute imposing taxes, although authorized to do other kinds of business as well as that of railroad transportation. *Kentucky Im-*

provement Co. v. Slack, 100 U. S. 648.

² *New York & E. R. Co. v. Sabin*, 26 Pa. St. 242; *Commonwealth v. Cleveland, P., & A. R. Co.*, 29 Pa. St. 370; *Delaware & H. Canal Co. v. Commonwealth*, 43 Pa. St. 227; *Quincy Bridge Co. v. Adams Co.*, 88 Ill. 615; *Burlington & S. W. R. Co. v. Counties*, 5 Dill. 289.

³ *State v. Railroad Com'rs*, 12 Vroom, 235.

⁴ *Delaware Railroad Tax*, 18 Wall. 206, 231; *Dubuque v. Chicago, D., & M. R. Co.*, 47 Iowa, 196.

⁵ *Davenport v. Chicago, R. I., & P. R. Co.*, 38 Iowa, 633; *Dubuque v. Ill. Cent. R. Co.*, 39 Iowa, 56.

poration and its creditors.¹ For the same reason, it cannot tax the dividends of non-residents, by requiring the corporation to reserve a portion as a tax.² But it may tax the capital stock though held in part by non-residents, either as a whole, or as divided into shares.³ Its right to tax its citizens for the debts due to them by a foreign corporation is not affected by the fact that they are secured by a mortgage on real estate situated in such foreign State.⁴

A State may tax its citizens for shares in the capital of a foreign corporation, or for bonds of the corporation which are held by them, regardless of the foreign law as to the taxation of the capital stock.⁵

Where the railroad runs through different States, a tax upon the income or franchise is properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation.⁶ A foreign corporation which succeeds to the management of a railroad situated in another State, under a lease or purchase confirmed by such State, becomes taxable as a domestic corporation under its laws.⁷ Personal property permanently remaining in a State has a *situs* therein for the purposes of taxation, although belonging to a foreign corporation.⁸

¹ Northern Cent. R. Co. v. Jackson, 7 Wall. 262; State Tax on Foreign-held Bonds, 15 Wall. 300; United States v. Balt. & O. R. Co., 17 Wall. 322; Murray v. Charleston, 96 U. S. 432; Kirtland v. Hotchkiss, 100 U. S. 491; Commonwealth v. Chesapeake & O. R. Co., 27 Gratt. 344; Davenport v. Miss. & M. R. Co., 12 Iowa, 539. *Contra*, Maltby v. Reading & C. R. Co., 52 Pa. St. 140; Pittsburg, Ft. W., & C. R. Co. v. Commonwealth, 66 Pa. St. 73; Delaware, L., & W. R. Co. v. Commonwealth, 66 Pa. St. 64; Buffalo & E. R. Co. v. Commonwealth, 3 Brewster, 374.

² Oliver v. Washington Mills, 11 Allen, 268.

³ National Bank v. Commonwealth, 9 Wall. 353; Delaware Railroad Tax, 18 Wall. 206, 230; Faxton v. McCosh, 12 Iowa, 527; Jenkins v. Charleston, 5 S. C. 393. See Commonwealth v. Hamilton Man. Co., 12 Allen, 298.

⁴ Kirtland v. Hotchkiss, 100 U. S. 491.

⁵ Dwight v. Boston, 12 Allen, 316; McKeen v. Northampton County, 49 Pa. St. 519; Whitesell v. Northampton County, 49 Pa. St. 526; Worthington v. Sebastian, 25 Ohio St. 1; Delaware Railroad Tax, 18 Wall. 206, 230; Appeal Tax Court v. Patterson, 50 Md. 354; Appeal Tax Court v. Gill, 50 Md. 377. But it has been held that, to prevent double taxation, a statute is to be construed as exempting the shares so held when the capital stock is fully taxed in the State where the corporation is established. Smith v. Exeter, 37 N. H. 556; Savings Bank v. Nashua, 46 N. H. 389, 398.

⁶ Delaware Railroad Tax, 18 Wall. 206; Erie R. Co. v. Pennsylvania, 21 Wall. 492; State Railroad Tax Cases, 92 U. S. 575, 611; Buffalo & E. R. Co. v. Commonwealth, 3 Brewster, 374; *ante*, Chap. I. p. 20.

⁷ Indianapolis & St. L. R. Co. v. Vance, 96 U. S. 450; Commonwealth v. Cleveland, P., & A. R. Co., 29 Pa. St. 370.

⁸ Irvin v. New Orleans, St. L., & C. R.

A municipality, having the power to require a license tax, may exact it of a company whose business is partly without as well as partly within its limits.¹

Corporate Property and Interests, how Taxed.—Taxes may be levied on a corporation or interests therein as follows: Upon (1) capital stock, (2) corporate property, (3) franchises, (4) individual shares. The first three are usually united in a tax levied on the corporation, while the last is levied on the stockholders.² The capital stock, corporate property, and franchises are taxed as an entirety, either directly or by taxation of the individual shares or revenues of the company; and the tax, unless appropriated wholly for State purposes, is distributed among counties, or cities and towns, according to some equitable mode of division.³ The property, however, of the company which is not used for railroad purposes, or is held for purposes not connected with the franchise, is usually taxable like other property by municipal corporations.⁴

In some jurisdictions, the property of the company, real and personal, including rolling-stock, is taxed in the places where it is situated; but the attempt to sever what is an essential unit only leads to confusion and inequalities.⁵ Another mode is to tax the franchise as an entirety, valuing it by the excess of the market value of the aggregate shares of the capital stock over the market value of the visible or tangible property which remains subject to local taxation.⁶

Co., 94 Ill. 105. See *St. Louis v. Ferry Co.*, 11 Wall. 423; *Dubuque v. Ill. Cent. R. Co.*, 39 Iowa, 56.

¹ *San José v. San José & S. C. R. Co.*, 53 Cal. 475.

² *Porter v. Rockford, R. I., & St. L. R. Co.*, 76 Ill. 561; *Louisville & N. R. Co. v. State*, 8 Heisk. 663; *Delaware Railroad Tax*, 18 Wall. 206. The shares were held not taxable under the statute in *Richmond v. Daniel*, 14 Gratt. 385; *Farrington v. Tennessee*, 95 U. S. 679, 686, 687.

³ *Missouri River, F. S., & G. R. Co. v. Morris*, 7 Kan. 210; *Applegate v. Ernst*, 3 Bush, 648; *State v. Hamilton*, 5 Ind. 310; *Michigan Cent. R. Co. v. Porter*, 17 Ind. 380; *State v. Severance*, 55 Mo. 378; *Davenport v. Miss. & M. R. Co.*, 16 Iowa, 348; *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221. Taxation

of the profits of the corporation is said to be the only just rule in *Paine v. Wright*, 6 McLean, 395.

⁴ *Toledo & W. R. Co. v. Lafayette*, 22 Ind. 262.

⁵ *Louisville & N. R. Co. v. State*, 8 Heisk. 663; *Orange & A. R. Co. v. Alexandria*, 17 Gratt. 176; *Dubuque & P. R. Co. v. Webster County*, 21 Iowa, 235; *Dubuque v. Ill. Cent. R. Co.*, 39 Iowa, 56; *Porter v. Rockford, R. I., & St. L. R. Co.*, 76 Ill. 561, 584.

⁶ *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75; *Commonwealth v. Hamilton Man. Co.*, 12 Allen, 298, 6 Wall. 632; *Porter v. Rockford, R. I., & St. L. R. Co.*, 76 Ill. 561; *Chicago, B., & Q. R. Co. v. Cole*, 75 Ill. 591; *Chicago, B., & Q. R. Co. v. Paddock*, 75 Ill. 616; *State Railroad Tax Cases*, 92 U. S. 575. As to the taxation of property held under

The personal property of a railroad company is, when taxed like other property, taxable where the company has its principal office or place of business.¹ This rule has been followed in the taxation of rolling-stock.² But personal property, including rolling-stock, is often treated as a part of the road.³ Persons operating a railroad, under lease or otherwise, are taxable for the rolling-stock used on it, irrespective of the ownership of the road or of the rolling-stock.⁴

The corporate franchise may be taxed by a rate imposed on the earnings. Such a tax has been held not to exempt the railroad and property from municipal taxation.⁵ It has been also held not to violate a provision of a State constitution requiring uniformity of taxation.⁶ The tax may be graduated by the amount of the income, or by the value of the franchise or property.⁷ The gross receipts as well as net earnings of a corporation may be taxed by a State without invading the power of Congress to regulate interstate commerce, even though in part derived from the transportation of merchandise between States.⁸

Where profits are taxed, they are taxable in the shape of divi-

a lease, see *Appeal Tax Court v. Western Md. R. Co.*, 50 Md. 274; *Phil. W., & B. R. Co. v. Appeal Tax Court*, 50 Md. 397.

¹ *Sangamon & M. R. Co. v. Morgan County*, 14 Ill. 163; *State v. Haight*, 1 Vroom, 447; *State v. Person*, 3 Vroom, 134; *Portland, S., & P. R. Co. v. Saco*, 60 Me. 196; *Western Trans. Co. v. Scheu*, 19 N. Y. 408; *State v. Hamilton*, 5 Ind. 310; *State Railroad Tax Cases*, 92 U. S. 575, 607.

² *Sangamon & M. R. Co. v. Morgan County*, 14 Ill. 163; *Orange & A. R. Co. v. Alexandria*, 17 Gratt. 176; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *State v. Severance*, 55 Mo. 378; *Appeal Tax Court v. Western Md. R. Co.*, 50 Md. 274; *Phil. W., & B. R. Co. v. Appeal Tax Court*, 50 Md. 397; *Appeal Tax Court v. Northern Cent. R. Co.*, 50 Md. 417. See *Davenport v. Miss. & M. R. Co.*, 16 Iowa, 348; *Dubuque & S. C. R. Co. v. Dubuque*, 17 Iowa, 120; *Dubuque v. Ill. Cent. R. Co.*, 39 Iowa, 56.

³ *Louisville & N. A. R. Co. v. State*, 25 Ind. 177; *Fitchburg R. Co. v. Prescott*, 47 N. H. 62.

⁴ *Kennedy v. St. Louis, V., & T. H.*

R. Co., 62 Ill. 395; *Huck v. Chicago & A. R. Co.*, 86 Ill. 352. See *Cook County v. Chicago, B., & Q. R. Co.*, 35 Ill. 460.

⁵ *Dunlieth & D. Bridge Co. v. Dubuque*, 32 Iowa, 427; *Davenport v. Chicago, R. I., & P. R. Co.*, 38 Iowa, 633. As to a tax on earnings in case of division of lines, see *Chicago, M., & St. P. R. Co. v. Pfaender*, 23 Minn. 217.

⁶ *Kneeland v. Milwaukee*, 15 Wis. 454 (overruling *Attorney-General v. Winnebago, L., & F. R. Plank R. Co.*, 11 Wis. 35); *Dean v. Gleason*, 16 Wis. 1. See as to State constitutional provisions requiring uniformity of taxation, *Gilman v. Sheboygan*, 2 Black, 510; *State Railroad Tax Cases*, 92 U. S. 575; *Muscatine v. Miss. & M. R. Co.*, 1 Dill. 536; *Bureau County v. Chicago, B., & Q. R. Co.*, 44 Ill. 229; *Chicago & N. W. R. Co. v. Boone County*, 44 Ill. 240; *Missouri River, F. S., & G. R. Co. v. Morris*, 7 Kan. 210.

⁷ *Delaware Railroad Tax*, 18 Wall. 206.

⁸ *State Taxes on Railway Gross Receipts*, 15 Wall. 284; *Buffalo & E. R. Co. v. Commonwealth*, 3 Brewster, 386.

dends of stock as well as of money;¹ but an issue of new stock, when not based on profits, is not taxable as such.²

A railroad is not subject to be severed and sold in sections for non-payment of taxes.³ Where the track was by statute declared to be personal property, the rails, it was held, could be levied on, removed, and sold for non-payment of taxes.⁴ Rolling-stock is liable to seizure and sale for non-payment of taxes.⁵

State Methods.—In New York, the property of railroad companies is subject to municipal taxation in the same manner as the property of individuals, without any distinctive rules of valuation.⁶ The land and fixtures necessary for the road are taxable in the towns or wards where they are situated, at the value at the time of assessment; and the company is, as to land and fixtures within a town, treated as a resident, although its principal place of business is elsewhere.⁷ So much of the capital stock as remains after deducting all the real estate valued at cost, including the railroad, is taxable as personal estate in the town or ward where the company has its principal office or place of business.⁸ The real estate, including the track, is valued, not as an isolated piece of property, or as land in the vicinity used for ordinary purposes, but as a part of a whole, in connection with its use and relations and the profits derivable from it.⁹ The company is taxed upon its track with fixtures as for "land," although it is not the owner

¹ *Commonwealth v. Cleveland, P., & A. R. Co.*, 29 Pa. St. 370.

² *Commonwealth v. Erie & P. R. Co.*, 10 Phil. 465.

³ *Georgia v. Atlantic & G. R. Co.*, 3 Woods, 434.

⁴ *Maus v. Logansport, P., & B. R. Co.*, 27 Ill. 77. It was held in *Mohawk & H. R. R. Co. v. Clute*, 4 Paige, 384, that such a declaration does not change the character of the property which is held by the company in its corporate capacity.

⁵ *Randall v. Elwell*, 52 N. Y. 521.

⁶ 1 Rev. Stat. (6th ed.) pp. 935, 979.

⁷ *People v. Cassity*, 46 N. Y. 46; *People v. Barker*, 48 N. Y. 70; *Buffalo & S. L. R. Co. v. Board of Supervisors*, 48 N. Y. 93.

⁸ *Mohawk & H. R. R. Co. v. Clute*, 4 Paige, 384; *People v. Supervisors of Niagara*, 4 Hill, 20.

⁹ *People v. Barker*, 48 N. Y. 70; *People*

v. Fredericks, 48 Barb. 173. An earlier rule disregarded the relations of a particular piece of the railroad to the rest of the enterprise. *Albany & S. R. Co. v. Osborn*, 12 Barb. 223; *Albany & W. S. R. Co. v. Canaan*, 16 Barb. 244. For discussions as to mode of valuing the real estate, including track, see *Sangamon & M. R. Co. v. Morgan County*, 14 Ill. 163; *State v. Illinois Central R. Co.*, 27 Ill. 64; *State v. Central Pacific R. Co.*, 7 Nev. 99; *State v. Central Pacific R. Co.*, 10 Nev. 47; *Huntington v. Central Pacific R. Co.*, 2 Sawyer, 503. As to mode of valuing the capital stock, see *Porter v. Rockford, R. I., & St. L. R. Co.*, 76 Ill. 561; *Chicago, B., & Q. R. Co. v. Cole*, 75 Ill. 591; *State Railroad Tax Cases*, 92 U. S. 575; *Commonwealth v. Pittsburgh, Ft. W., & C. R. Co.*, 74 Pa. St. 83.

of the fee.¹ Foundations for piers on a public street for an elevated railroad are taxable as real estate.²

In New Jersey, by the act of 1873, a State tax of one half of one per centum is laid upon "the cost, equipment, and appendages" of the railroad, and a county and municipal tax of one per centum upon real property occupied, used, or owned for the purposes of the road, excepting the main stem or road-bed and track not exceeding one hundred feet in width, exempting, however, from such municipal taxation ten acres in one parcel with improvements at the termini.³

In Massachusetts, by the act of 1865, railroad and other corporations are taxed, at the average rate of municipal taxation in the State, on the franchise valued by a State tax commissioner, who is required to take the sum total of all the shares at the market rate, and to deduct therefrom the value of real estate and machinery subject to local taxation, and, where the road extends into other States, such portion of the whole valuation as is proportional to the length of the part of the road outside of the State. The track of five rods in width is, as will be seen elsewhere, constructively exempt from municipal taxation, but it is taxed in effect by the taxation of the franchise. The entire tax, when collected by the State, is distributed among or credited to the towns and cities of the State in the proportion of the tax represented by stockholders resident therein; and the State retains the balance, being the proportion represented by shares owned by non-residents. It will be seen that the municipalities in which the stockholders live, and not those in which the road lies, derive a revenue from the tax. This system of taxing the franchise has been sustained by the State and national tribunals.⁴

In Illinois, by the act of 1872, there are, as to railroads, three separate valuations, which in general are as follows: 1. The real estate, which is not a part of the right of way; and the personal property, which remains permanently at a place. 2. The right of way with superstructure and buildings upon it, and rolling-stock

¹ *People v. Beardsley*, 52 Barb. 105; *People v. Cassity*, 46 N. Y. 46.

² *People v. Com'rs of Taxes*, 80 N. Y. 573, 19 Hun, 460.

³ *State v. Com'r of Railroad Taxation*, 8 Vroom, 228, 9 Vroom, 472; *State v. Mutchler*, 12 Vroom, 96; *State v. Weth-*

erill, 12 Vroom, 147. See later act of 1876, *State v. Railroad Com'rs*, 12 Vroom, 235.

⁴ *Hamilton Man. Co. v. Massachusetts*, 6 Wall. 632, 12 Allen, 298; *Dwight v. Boston*, 12 Allen, 316; *Attorney-General v. Bay State Mining Co.*, 99 Mass. 148.

and personal property which is not local. 3. The excess of the capital stock, including the franchise, over the first two classes which are designated as tangible property. The first class is taxable locally like other property, while the other two are each valued by a State board as a whole, and each county, city, and town taxes the corporation on this valuation in proportion to the length of the road within its own limits. The State board, under its power to adopt rules and principles of valuation, determined the cash value of the capital stock, including franchise, by adding together the market value of all the shares and of the funded debt, and deducting from the aggregate result the market or cash value of the tangible property as required. The statute and the method pursued under it have been approved as just and conforming to the Constitution of the State as well as not in conflict with that of the United States.¹

Exemptions from Taxation.—The property of corporations, like that of persons, is subject to taxation, and exemptions cannot be established by doubtful implications.²

Construction of Statutes exempting from Taxation.—Statutes, which for the time being exempt railroad corporations from taxation, or apply to them special rates to the exclusion of ordinary municipal taxation, are, when subject to repeal, to be construed according to the rules stated in a later connection, where the construction of grants or contracts of exemption, which, under the National Constitution, are irrevocable, are considered.³

Where the charter exempts the company's lands from taxation until sold and conveyed, a contract of sale without a conveyance,

¹ *Porter v. Rockford, R. I., & St. L. R. Co.*, 76 Ill. 561; *Chicago, B., & Q. R. Co. v. Cole*, 75 Ill. 591; *Chicago, B., & Q. R. Co. v. Paddock*, 75 Ill. 616; *Huck v. Chicago & A. R. Co.*, 86 Ill. 352; *Chicago, B., & Q. R. Co. v. Siders*, 88 Ill. 320; *Danville L. & M. Co. v. Parks*, 88 Ill. 463; *Chicago, R. I., & P. R. Co. v. People*, 4 Brad. (Ill.) 468; *State Railroad Tax Cases*, 92 U. S. 575; *Indianapolis & St. L. R. Co. v. Vance*, 96 U. S. 450. For decisions in Georgia as to the taxation of railroad companies, see *Macon & A. R. Co. v. Goldsmith*, 62 Ga. 463; *Goldsmith v. Augusta & S. R. Co.*, 62 Ga. 468; *Gold-*

smith v. Rome R. Co., 62 Ga. 473; *Goldsmith v. Georgia R. Co.*, 62 Ga. 485; *Goldsmith v. Southwestern R. Co.*, 62 Ga. 495; *Goldsmith v. Central R. Co.*, 62 Ga. 509. For decisions in Nebraska, see *Burlington & M. R. R. Co. v. Lancaster County*, 7 Neb. 33; *Burlington & M. R. R. Co. v. York County*, 7 Neb. 487; and in Iowa, see *Dubuque v. Chicago, D., & M. R. Co.*, 47 Iowa, 196.

² *People v. Com'rs of Taxes*, 76 N. Y. 64; *People v. Com'rs of Taxes*, 11 N. Y. W. D. 110, 19 Hun, 460.

³ *Post*, pp. 483-485.

which is forfeited according to its terms for non-payment of the purchase-money, does not subject them to taxation.¹

Exemptions implied or constructive.—An exemption from local taxation may be implied where the company would otherwise be subject to double taxation, and such taxation appears to be contrary to the legislative intent. Thus, the imposition, by a special act, of a State tax on all the property of the company has been construed to exempt machine-shops, foundries, and station-houses from local taxation under general laws.² The taxation of individual shareholders for their shares creates no presumption against the right of municipalities to tax real property, including the track, which is within their respective limits.³

The character of railroad companies as public works similar to public buildings, highways, and aqueducts has been held in some States to effect a constructive exemption of their property which is within the location and necessary for their purposes. Thus, in Massachusetts, where the corporation may lay out its road not exceeding five rods in width, and for certain purposes acquire land outside of such location, the company is not liable to be taxed for land within the five rods, or for buildings and structures thereon which are necessarily incident to its business; but if any part of the land within such limits is used for and appropriated to purposes not incident to the proper construction, maintenance, and management of the railroad, or if the company acquires by purchase or even grant from the State other land outside of those limits, such real estate, in either case, with the erections thereon, will be subject to taxation.⁴ A similar rule of constructive exemption with a like limitation is adopted in Pennsylvania, where the property of the corporation which is necessary for its purposes is exempt, while property which is merely convenient and useful for the increase of business and for making profits is taxable.⁵ In other jurisdictions the doctrine of a constructive ex-

¹ Illinois Cent. R. Co. v. Goodwin, 94 Ill. 262.

² New York & E. R. Co. v. Sabin, 26 Pa. St. 242; Hannibal & St. J. R. Co. v. Shacklett, 30 Mo. 550; State v. Han. & St. J. R. Co., 37 Mo. 265. But *contra*, Orange & A. R. Co. v. Alexandria, 17 Gratt. 176; Dunlieth & D. Bridge Co. v. Dubuque, 32 Iowa, 427.

³ Providence & W. R. Co. v. Wright, 2 R. I. 459.

⁴ Worcester v. Western R. Co., 4 Met. 564; Boston & M. R. v. Cambridge, 8 Cush. 237; Wayland v. County Com'rs, 4 Gray, 500; Charlestown v. County Com'rs, 1 Allen, 199; Commonwealth v. Lowell Gas Light Co., 12 Allen, 75.

⁵ Railroad Co. v. Berks County, 6 Pa.

emption is rejected, and property, including the track, has been held liable to municipal taxation, unless specially exempted.¹

Local Assessments.—The authorities are in conflict on the question whether a railroad company is liable to special assessments; on the ground of a supposed benefit to it, for local improvements, as the widening, paving, or laying out of streets.² They have been held not to be within the prohibition of statutes which exempt the company from taxes.³

A street-railroad company has been held liable for such local assessments, unless excepted.⁴ It may be required to contribute to the expense of paving and widening the street.⁵ It has been held, where the stockholders are taxed, to be exempt from taxation on its personal property, the value of such property being held to be included in the valuation of the shares.⁶

Grant or Contract of Exemption from Taxation.—The power of the legislature of a State, when not prohibited by the Constitution, to bind the State by a grant of exemption from taxation has been at times contested or questioned as an unauthorized surren-

St. 70; *Schuylkill Nav. Co. v. Berks County*, 11 Pa. St. 202; *Wayne County v. Del. & H. Canal Co.*, 15 Pa. St. 351; *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465, 469; *Erie County v. Erie & W. Trans. Co.*, 87 Pa. St. 434.

¹ *Providence & W. R. Co. v. Wright*, 2 R. I. 459; *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291, 296; *Orange & A. R. Co. v. Alexandria*, 17 Gratt. 176; *Burlington & M. R. R. Co. v. Spearman*, 12 Iowa, 112; *Phil. W., & B. R. Co. v. Bayless*, 2 Gill, 355; *Louisville & P. C. Co. v. Commonwealth*, 7 B. Monr. 160; *Cumberland Marine R. Co. v. Portland*, 37 Me. 444 (overruling *Bangor & P. R. Co. v. Harris*, 21 Me. 533).

² They were held legal in *Northern Ind. R. Co. v. Connelly*, 10 Ohio St. 159; *Burlington & M. R. R. Co. v. Spearman*, 12 Iowa, 112; *Davenport v. Miss. & M. R. Co.*, 16 Iowa, 348; *Peru & I. R. Co. v. Hanna*, 68 Ind. 562; *Troy & L. R. Co. v. Kane*, 9 Hun, 506. They have been held illegal in *Philadelphia v. Phil. W., & B. R. Co.*, 33 Pa. St. 41; *Junction R. Co. v. Philadelphia*, 88 Pa. St. 424; *New York*

& H. R. Co. v. Morrisania, 7 Hun, 652; *Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255; *New York & N. H. R. Co. v. New Haven*, 42 Conn. 279. See *London, B., & S. C. R. Co. v. St. Giles, Camberwell*, L. R. 4 Exch. Div. 239.

³ *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *State v. Newark*, 6 Vroom, 157; *State v. Jersey City*, 7 Vroom, 56; *State v. Elizabeth*, 8 Vroom, 330; *State v. Newark*, 3 Dutcher, 185. They have been held to be included in the term "assessments." *St. Paul & P. R. Co. v. St. Paul*, 21 Minn. 526; *Brightman v. Kirner*, 22 Wis. 54; *Ohio Cemetery Co. v. Philadelphia*, 10 Rep. 183. *Contra*, *State v. Newark*, 6 Vroom, 157.

⁴ *New Haven v. Fair Haven & W. R. Co.*, 38 Conn. 422. In *Chicago v. Sheldon*, 9 Wall. 50, it was held that the city had made a contract with the company not to make such assessments.

⁵ *Chicago v. Baer*, 41 Ill. 306; *Paramelee v. Chicago*, 60 Ill. 267; *North Beach & M. R. Co.'s Appeal*, 32 Cal. 499.

⁶ *Middlesex R. Co. v. Charlestown*, 8 Allen, 320.

der of an essential attribute of sovereignty.¹ It has, however, been held by the Supreme Court of the United States that a grant of exemption from taxation, or an agreement in the charter that no other than a certain tax shall be imposed, is within the provision of the National Constitution which forbids State laws impairing the obligation of a contract.²

Surrender of Taxing Power not presumed. Temporary Exemptions.

— The surrender of the taxing power is not to be presumed, unless the purpose of the State to part with it clearly appears. The power is essential to the existence of government, and it is of vital

¹ *Brewster v. Hough*, 10 N. H. 138; *Debolt v. Ohio Life Ins. & T. Co.*, 1 Ohio St. 563; *Mechanics' & T. Bank v. Debolt*, 1 Ohio St. 591; *Toledo Bank v. Toledo*, 1 Ohio St. 622; *Plank Road Co. v. Husted*, 3 Ohio St. 578; *Sandusky City Bank v. Wilbor*, 7 Ohio St. 481; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 146; *Mott v. Penn. R. Co.*, 80 Pa. St. 9; *Raleigh & G. R. Co. v. Reid*, 64 N. C. 155; *People v. Barger*, 62 Ill. 452; *West Wisconsin R. Co. v. Supervisors*, 35 Wis. 257; *Commonwealth v. Chesapeake & O. R. Co.*, 27 Gratt. 344.

² *New Jersey v. Wilson*, 7 Cranch, 164; *State Bank v. Knoop*, 16 How. 369; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416; *Dodge v. Woolsey*, 18 How. 331; *McGee v. Mathis*, 4 Wall. 143; *Van Hoffman v. Quincy*, 4 Wall. 535, 554; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Washington University v. Rouse*, 8 Wall. 439, 42 Mo. 308; *Wilmington R. Co. v. Reid*, 13 Wall. 264; *Tomlinson v. Jessup*, 15 Wall. 454, 458; *Tomlinson v. Branch*, 15 Wall. 460; *Humphrey v. Pegues*, 16 Wall. 244; *Pacific R. Co. v. Maguire*, 20 Wall. 36; *New Jersey v. Yard*, 95 U. S. 104; *Farrington v. Tennessee*, 95 U. S. 679; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, 66 Me. 488; *North Western University v. People*, 99 U. S. 809; *Union Passenger R. Co. v. Philadelphia*, 101 U. S. 528; *Louisville & N. R. Co. v. Gaines* (U. S. C. C., M. D. Tenn.), 12 Chicago Leg. News, 407, 3 Fed. Rep. 266. For decisions in the State courts sustaining the power, see *Armington v. Barnet*, 15 Vt. 745, 751; *Herrick v. Randolph*, 13 Vt. 525; *Atwater v. Woodbridge*, 6 Conn.

223; *Osborne v. Humphrey*, 7 Conn. 335; *Parker v. Redfield*, 10 Conn. 490, 495; *Landon v. Litchfield*, 11 Conn. 251; *State v. Maine Cent. R. Co.*, 66 Me. 488; *Portland v. Portland Water Co.*, 67 Me. 135; *State v. Dexter & N. R. Co.*, 69 Me. 44; *State v. Berry*, 2 Harrison, 80; *Camden & A. R. Co. v. Hillegas*, 3 Harrison, 11; *Camden & A. R. Co. v. Com'rs*, 3 Harrison, 71; *Gardner v. State*, 1 Zab. 557; *State v. Com'rs*, 8 Vroom, 240; *Baltimore v. Balt. & O. R. Co.*, 6 Gill, 288; *State v. Balt. & O. R. Co.*, 48 Md. 49; *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291; *Neustadt v. Ill. Cent. R. Co.*, 31 Ill. 484; *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452; *Illinois Cent. R. Co. v. Goodwin*, 94 Ill. 262; *People v. Soldiers' Home*, 95 Ill. 561; *O'Donnell v. Bailey*, 24 Miss. 386; *Mobile & O. R. Co. v. Moseley*, 52 Miss. 127; *Grand Gulf & P. G. R. Co. v. Buck*, 53 Miss. 246; *Scotland County v. Mo., I., & N. R. Co.*, 65 Mo. 123; *Iron City Bank v. Pittsburg*, 37 Pa. St. 340; *Richmond v. Richmond & D. R. Co.*, 21 Gratt. 604; *Commonwealth v. Chesapeake & O. R. Co.*, 27 Gratt. 344; *State v. Bank of Smyrna*, 2 Houst. 99; *Matheny v. Golden*, 5 Ohio St. 361; *State v. Auditor of Athens County*, 5 Ohio St. 444; *Ross County Bank v. Lewis*, 5 Ohio St. 447; *Atlantic & G. R. Co. v. Allen*, 15 Fla. 637; *Oliver v. Memphis & I. R. R. Co.*, 30 Ark. 128; *St. Louis, I. M., & S. R. Co. v. Loftin*, 30 Ark. 693. The grant cannot be repealed by a provision of the State Constitution any more than by a legislative act. *Scotland County v. Mo., I., & N. R. Co.*, 65 Mo. 123.

importance that it should remain unimpaired.¹ The charter may prescribe a temporary rate of taxation, which, like a rate fixed for the time being in a general law, may be raised or changed without impairing the obligation of a contract; and whether the provision was intended as a contract that no other or higher should be imposed is a question of construction. The mere imposition, in the charter or a special act of a bonus or tax, does not imply a contract not to impose another or higher one.² Nor does a bounty law offering exemption to companies carrying on a certain business disable the State from taxing them.³ But other provisions which expressly exempt from further taxation, or require conditions which the company has performed on the faith of the exemption, imply a contract.⁴

Form of Grant or Contract.—A grant of exemption from taxation, or from any taxation except that specially provided for in

¹ *Providence Bank v. Billings*, 4 Peters, 514, 561; *Phil. & W. R. Co. v. Maryland*, 10 How. 416, 376; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 435; *Delaware Railroad Tax*, 18 Wall. 206; *Pacific R. Co. v. Maguire*, 20 Wall. 36; *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 49 Mo. 490; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Hoge v. Richmond & D. R. Co.*, 99 U. S. 348; *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 528; *People v. Com'rs of Taxes*, 19 Hun, 460, 11 N. Y. W. D. 110; *Tucker v. Ferguson*, 22 Wall. 527; *Bank of Penn. v. Commonwealth*, 19 Pa. St. 144; *Erie R. Co. v. Commonwealth*, 66 Pa. St. 84; *State v. Newark*, 2 Dutcher, 519; *State v. Parker*, 3 Vroom, 426; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *State v. Maine Cent. R. Co.*, 66 Me. 488; *Commonwealth v. Chesapeake & O. R. Co.*, 27 Gratt. 344; *Baltimore & O. R. Co. v. Supervisors*, 3 W. Va. 319; *Louisville, C., & L. R. Co. v. Commonwealth*, 10 Bush, 43; *State v. Bank of Smyrna*, 2 Houst. 99; *People v. Roper*, 35 N. Y. 629; *St. Louis, I. M., & S. R. Co. v. Loftin*, 30 Ark. 693; *County Com'rs v. Annapolis & E. R. R. Co.*, 47 Md. 592; *County Com'rs v. Sisters of Charity*, 48 Md. 34; *Appeal Tax Court v. Rice*, 50 Md. 302; *Appeal Tax Court v. St. Peter's Academy*, 50 Md. 321.

² *Easton Bank v. Commonwealth*, 10 Pa. St. 442; *New York & E. R. Co. v. Sabin*, 26 Pa. St. 242; *Erie R. Co. v. Commonwealth*, 3 Brewster, 368; *State Bank of Ohio v. Knoop*, 16 How. 369, 406; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416; *Christ Church v. Phil. County*, 24 How. 300; *Delaware Railroad Tax*, 18 Wall. 206, 2 Abbott U. S. 323; *North Missouri R. Co. v. Maguire*, 20 Wall. 46; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492; *Tucker v. Ferguson*, 22 Wall. 527; *Central R. & B. Co. v. Georgia*, 92 U. S. 665, 675; *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 528; *St. Joseph v. Han. & St. J. R. Co.*, 39 Mo. 476; *Louisville, C., & L. R. Co. v. Commonwealth*, 10 Bush, 43; *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291, 296; *Baltimore v. Balt. & O. R. Co.*, 6 Gill, 288; *People v. Com'rs of Taxes*, 19 Hun, 460, 11 N. Y. W. D. 110. A distinction between a tax and a license is taken in *Johnson v. Philadelphia*, 60 Pa. St. 445.

³ *East Saginaw Man. Co. v. East Saginaw*, 13 Wall. 373, 19 Mich. 259.

⁴ *Iron City Bank v. Pittsburg*, 37 Pa. St. 340; *Neustadt v. Illinois Cent. R. Co.*, 31 Ill. 484; *Parmelee v. Chicago*, 60 Ill. 267; *Chicago v. Sheldon*, 9 Wall. 50; *New Jersey v. Yard*, 95 U. S. 104; *Farrington v. Tennessee*, 95 U. S. 679.

the charter, is not less a contract protected by the Constitution, because the terms of contract or agreement are not used. Ordinarily the contract is implied from a provision that the corporation or its property shall be exempt from taxation, or from any other than that prescribed.¹ Nor is any actual consideration necessary to support the grant.² A gratuitous exemption made by the State has been said not to be binding.³

Construction of Grants of Exemption from Taxation.—The exemption of the company generally from taxation includes local as well as State taxes,⁴ and the corporate property as well as the franchise.⁵ The exemption of the capital stock,⁶ or of the shares thereof,⁷ exempts the property (or so much thereof as is necessary for corporate purposes) and the franchise, including the gross receipts or income. But the mere exemption of the capital stock will not exempt the railroad and tangible property where the grant by its terms discriminates between the capital stock and such property.⁸ The exemption of all property includes the franchise⁹ and the gross receipts;¹⁰ the exemption of capital stock will cover any increase of it, even though made in the form of preferred stock;¹¹ the exemption of the road and its appurte-

¹ *Home of the Friendless v. Rouse*, 8 Wall. 430; *New Jersey v. Yard*, 95 U. S. 104; *Farrington v. Tennessee*, 95 U. S. 679; *State v. Dexter & N. R. Co.*, 69 Me. 44.

² *Home of the Friendless v. Rouse*, 8 Wall. 430, 437. Municipal charters are not contracts which prevent legislative exemptions from taxation of property within them. *Richmond v. Richmond & D. R. Co.*, 21 Gratt. 604. See a decision which cannot be sustained on principle in *Dubuque v. Ill. Cent. R. Co.*, 39 Iowa, 56.

³ *Tucker v. Ferguson*, 22 Wall. 527, 574; *Christ Church v. Phil. County*, 24 How. 300; *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 528, 532; *St. Louis, I. M., & S. R. Co. v. Loftin*, 30 Ark. 693, 700. See *Baltimore v. Balt. & O. R. Co.*, 6 Gill, 288.

⁴ *Baltimore v. Balt. & O. R. Co.*, 6 Gill, 288; *Camden & A. R. Co. v. Hillegas*, 3 Harrison, 11; *State v. Hancock*, 6 Vroom, 537; *Southern R. Co. v. Jackson*, 38 Miss. 334; *Neustadt v. Ill. Cent. R. Co.*, 31 Ill.

484. See *Phil., W., & B. R. Co. v. Bayless*, 2 Gill, 355.

⁵ *State v. Berry*, 2 Harrison, 80; *Camden & A. R. Co. v. Hillegas*, 3 Harrison, 11; *Camden & A. R. Co. v. Com'rs*, 3 Harrison, 71; *State v. Hancock*, 6 Vroom, 537, 544.

⁶ *New Haven v. City Bank*, 31 Conn. 106; *Hannibal & St. J. R. Co. v. Shacklett*, 30 Mo. 550; *Scotland County v. Mo., I., & N. R. Co.*, 65 Mo. 123; *Richmond v. Richmond & D. R. Co.*, 21 Gratt. 604; *State v. Hood*, 15 Rich. 177; *Rome R. Co. v. Rome*, 14 Ga. 275.

⁷ *Baltimore v. Balt. & O. R. Co.*, 6 Gill, 288; *County Com'rs v. Annapolis & E. R. R. Co.*, 47 Md. 592; *State v. Balt. & O. R. Co.*, 48 Md. 49.

⁸ *Railroad Companies v. Gaines*, 97 U. S. 697; *Atlantic & G. R. Co. v. Allen*, 15 Fla. 637, 660.

⁹ *Wilmington R. Co. v. Reid*, 13 Wall. 264.

¹⁰ *Pacific R. Co. v. Maguire*, 20 Wall. 36.

¹¹ *State v. Norwich & W. R. Co.*, 30 Conn. 290.

nances will include a branch road;¹ but the exemption of the track does not exempt stations and other erections and buildings upon it.² Whether the grant of exemption was intended to exempt the stockholders from the taxation of their shares, as well as the corporation itself, is a question of construction.³

Exemptions limited to Property required for the Purposes of the Railroad.—Exemptions of the property of the company from all taxation, or from local taxation, or from other than a special tax, have been by construction limited to property reasonably necessary for its purposes, and sometimes to such as was actually used therefor. Such a limitation is in some cases expressed, and then it must be judicially determined what is reasonably necessary for the purposes of the railroad.⁴ Property has in some cases been held to be of this character and entitled to the exemption only where the corporation was authorized to take it by proceedings *in invitum* under the power of eminent domain.⁵ Under the rule limiting the grant to property reasonably necessary for railroad purposes, the roadway, warehouses, engine-houses, repair-shops, tanks, wood-sheds, fuel-yards, offices, and a branch road to a gravel-pit are exempt; while dwelling-houses for employees (except, perhaps, switch and bridge tenders, and station-masters), woodland bought for fuel, real estate left vacant and not intended for railroad uses, or rented for dwellings, stores, and coal-yards, are subject to ordinary municipal taxation.⁶ A steamboat to carry

¹ *Atlantic & G. R. Co. v. Allen*, 15 Fla. 637.

² *Portland, S., & P. R. Co. v. Saco*, 60 Me. 196.

³ *Farrington v. Tennessee*, 95 U. S. 679; *Gordon v. Appeal Tax Court*, 3 How. 133; *Delaware Railroad Tax*, 18 Wall. 206; *Belo v. County Com'rs*, 82 N. C. 415; *Memphis v. Ensley*, 6 Baxter, 553; *Memphis v. Farrington*, 8 Baxter, 539. The grant does not exempt the bondholders. *State v. Branin*, 3 Zab. 484.

⁴ *State v. Hancock*, 6 Vroom, 537, 545, criticises the rigid definition and application of the term *necessary*, which excludes what is only convenient and useful for the increase of business, as given in *State v. Mansfield*, 3 Zab. 510. See *State v. Leggett*, 12 Vroom, 319; *De Soto Bank v. Memphis*, 6 Baxter, 415; *Milwaukie & St. P. R. Co. v. Milwaukie*, 34 Wis. 271, 277.

⁵ *Vermont Cent. R. Co. v. Burlington*, 28 Vt. 193; *Eldridge v. Smith*, 34 Vt. 484, 491; *Milwaukie & St. P. R. Co. v. Milwaukie*, 34 Wis. 271, 278. This test is disapproved in *State v. Hancock*, 6 Vroom, 537, on the ground that the power to take property does not extend under some charters to all that is necessary for railroad purposes. See *ante*, Chap. VII. pp. 149, 150.

⁶ *State v. Mansfield*, 3 Zab. 510; *Gardner v. State*, 1 Zab. 557; *Cook v. State*, 4 Vroom, 474, 3 Vroom, 338; *State v. Hancock*, 6 Vroom, 537, 4 Vroom, 315; *State v. Fuller*, 11 Vroom, 328; *State v. Leggett*, 12 Vroom, 319; *St. Louis, I. M., & S. R. Co. v. Loftin*, 30 Ark. 693; *Day v. Joiner*, 6 Baxter, 441. See a similar construction of charters which limited the exemption to property used for railroad purposes. *State v. Woodruff*, 7 Vroom, 94; *Bibb*

passengers on a river from the terminus of the railroad to that of another has been held taxable.¹ Under a statute exempting from local taxation property "necessarily used in operating a railroad," elevators used for storing grain after consignees have had a reasonable time to take it away, and hotels admitting guests indiscriminately, whether passengers by the railroad or not, have been held taxable.²

The test of actual use for railroad purposes cannot be applied during the period of construction.³ The incidental use of the property, which is required by the company in its business, for other purposes does not deprive it of the exemption; but if principally used for other purposes it is taxable.⁴

Grant of Exemption from Taxation as affected by a Reserved Power to amend.—The State reserves its right to repeal an exemption from taxation or other privilege contained in the charter, where the charter itself reserves the right of amendment, or a general statute existing at the time makes all charters subject to amendment.⁵ The intent to take away the particular exemption must distinctly appear, and it will not be inferred from a general statute which declares all property subject to taxation.⁶

If the power to amend a charter is reserved by the State Constitution, the legislature cannot make a grant of powers and privileges which will not be subject to amendment. Thus, where the State Constitution contains such a provision, the legislature can repeal a grant of exemption from taxation which it has

County v. Central R. & B. Co., 40 Ga. 646; *Richmond & D. R. Co. v. County Com'rs*, 76 N. C. 212; *Belo v. County Com'rs*, 82 N. C. 415. This rule, subjecting property not used by the corporation to ordinary municipal taxation, has been rejected in the construction of a statute which provided a special tax on the capital stock, on the ground that it would result in double taxation. *Osborne v. New York & N. H. R. Co.*, 40 Conn. 491. The objection of double taxation was not thought valid in *State v. Newark*, 1 Dutcher, 315.

¹ *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452.

² *Milwaukie & St. P. R. Co. v. Crawford County*, 29 Wis. 116; *Milwaukie & St. P. R. Co. v. Milwaukie*, 34 Wis. 271; *State v. Balt. & O. R. Co.*, 48 Md. 49;

Erie County v. Erie & W. Trans. Co., 87 Pa. St. 434; *Toledo & W. R. Co. v. Lafayette*, 22 Ind. 262.

³ *State v. Haight*, 6 Vroom, 40; *State v. Collector of Middle Township*, 9 Vroom, 270; *State v. Wetherill*, 12 Vroom, 147.

⁴ *Milwaukie & St. P. R. Co. v. Crawford County*, 29 Wis. 116; *Milwaukie & St. P. R. Co. v. Milwaukie*, 34 Wis. 271.

⁵ *Tomlinson v. Jessup*, 15 Wall. 454; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, 66 Me. 488; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359; *Hoge v. Richmond & D. R. Co.*, 99 U. S. 348; *State v. Miller*, 1 Vroom, 368, 2 Vroom, 521; *State v. Com'r of Railroad Taxation*, 8 Vroom, 228, 9 Vroom, 472.

⁶ *State v. Minton*, 3 Zab. 529.

before made.¹ But where the reserved power is contained only in a statute, it is competent for the legislature to make an irrevocable grant, and to bind itself, where such an intent clearly appears, not to levy any taxes upon the company, or only those of a special kind.² The statute will also, where such appears to be its intent, be held to apply only to the original charter, and not to the amendments.³

Transfer of the Exemption.—The exemption from taxation is a personal privilege of the corporation to which it was granted, and does not pass to the purchasers of the railroad, or to mortgagees who become the owners by a foreclosure.⁴ The legislature may, unless restricted by the State Constitution, allow the transfer of the exemption to a new corporation which succeeds to the property of the exempted one, and its intent to continue the exemption after the transfer has been inferred from the general grant to the new corporation, of the rights, powers, and privileges of the exempted one;⁵ but the new corporation will not succeed to the exemption under a general grant of rights, powers, and privileges, where, from the comparison of its duties with those of its predecessor, a legislative purpose to continue the exemption does not appear.⁶

Where two corporations, one being by its charter exempt from taxation and the other not, are consolidated under a statute which, in general terms, invests the new corporation with the rights, powers, privileges, and property of the two, the new corporation will be entitled to the exemption only to the extent of the property and franchises acquired from the exempted corpora-

¹ *Trask v. Maguire*, 18 Wall. 391.

² *New Jersey v. Yard*, 95 U. S. 104; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, 510; *Hoge v. Richmond & D. R. Co.*, 99 U. S. 348; *Tomlinson v. Jessup*, 15 Wall. 454; *Trask v. Maguire*, 18 Wall. 391; *Scotland County v. Mo., I., & N. R. Co.*, 65 Mo. 123, 136; *State v. Dexter & N. R. Co.*, 69 Me. 44; *Western No. Car. R. Co. v. Rollins*, 82 N. C. 523, 528.

³ *New Jersey v. Yard*, 95 U. S. 104.

⁴ *Trask v. Maguire*, 18 Wall. 391; *Morgan v. Louisiana*, 93 U. S. 217, 28 La. An. 482; *Railroad Co. v. Gaines*, 97 U. S. 697, 711; *East Tenn., V., & G. R. Co. v. Hamblen County*, 102 U. S. 278.

⁵ *Humphrey v. Pegues*, 16 Wall. 244; *Louisville & N. R. Co. v. Gaines* (U. S. C. C., M. D. Tenn.), 3 Fed. Rep. 266, 12 Chicago Leg. News, 407; *Atlantic & G. R. Co. v. Allen*, 15 Fla. 637; *State v. Winona & St. P. R. Co.*, 21 Minn. 315; *State v. South. Minn. R. Co.*, 21 Minn. 344. But see *St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297.

⁶ *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, 66 Me. 488; *Central R. & B. Co. v. Georgia*, 92 U. S. 665, 54 Ga. 401; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 60 Ga. 268; *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559.

tion.¹ But the exemption, even to this extent, will not pass to the new body where an intent to discontinue it appears from the statute.²

If the effect of a consolidation is to terminate the existence of a corporation, which holds an irrevocable grant of exemption, the new corporation which succeeds to its property and powers will become subject to taxation. Whether the legislature intended to continue the exemption will depend upon the terms of the act which invested the new corporation with the privileges of the old one, and of existing legislation relative to taxation.³ If, at the time when the corporation which held the grant of exemption ceased to exist, there was a constitutional provision which made all subsequent charters subject to amendment or repeal, it will apply to the new corporation, and the legislature cannot invest it with the irrevocable exemption which belonged to the extinct corporation.⁴ But if the effect of the consolidation is not to destroy the old corporations and create a new one, the grant of exemption to the corporation will continue, and will not be affected by a statute reserving the power to amend, which took effect between the time when the grant was made and the time when the consolidation was effected.⁵

Exemption of the Instruments or Agencies of the United States.—

A State cannot tax the means or instruments employed by the government of the United States in the execution of its powers.⁶ This principle is not founded on any express prohibition in the Constitution, but on the necessity that the means for executing those powers should not be interfered with; and it does not exclude State legislation which does not interfere with the agencies of the national government, or impair their efficiency. Thus, while a State cannot tax the capital of national banks

¹ *Phil. & W. R. Co., Maryland*, 10 How. 376; *Tomlinson v. Branch*, 15 Wall. 460; *Delaware Railroad Tax*, 18 Wall. 206; *Central R. & B. Co. v. Georgia*, 92 U. S. 665, 675; *Branch v. Charleston*, 92 U. S. 677; *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718; *State v. Com'r of Railroad Taxation*, 8 Vroom, 240, 243.

² *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, 66 Me. 488.

³ *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, 66 Me. 488.

⁴ *State v. Northern Cent. R. Co.*, 44 Md. 131; *Shields v. Ohio*, 95 U. S. 319.

⁵ *Central R. & B. Co. v. Georgia*, 92 U. S. 665, 54 Ga. 401. But in other cases a consolidation is held to work an extinction of the corporations composing the new one. *Shields v. Ohio*, 95 U. S. 319; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 60 Ga. 268.

⁶ *McCulloch v. Maryland*, 4 Wheat. 316.

created by the United States, it can tax the individual shares of stockholders, and collect the tax of the corporation itself; and this although the capital is partly or wholly invested in national securities.¹ It cannot tax a railroad bridge owned by the United States, although used by a private corporation under a contract or license.²

A State may, in the absence of prohibition by Congress, tax the property of a railroad corporation created by State legislation, although it serves as a carrier to the national government as well as the public, and has received grants from it of lands and money, and made a mortgage to it; and although as a condition of such aid it is required to perform certain services and duties.³ And the property of a corporation so used and endowed is liable to State taxation, even though incorporated by the national government.⁴

Remedies for Illegal Assessments.—The ordinary remedies in the case of taxes illegally assessed and levied are an action at law after a compulsory payment, either of trespass against the collecting officer, or of assumpsit against such officer or the public corporation to which the amount has been paid.⁵ These remedies are ordinarily ample, and do not involve the public embarrassments incident to the intervention of equity in such cases. Equity will not, therefore, enjoin the collection of a tax alleged to be illegal, where there is an adequate remedy at law.⁶ It will not interfere by its preventive process on account

¹ *Van Allen v. Assessors*, 3 Wall. 573; *People v. Com'rs*, 4 Wall. 244; *National Bank v. Commonwealth*, 9 Wall. 353; *Austin v. Boston*, 14 Allen, 359.

² *Chicago, R. I., & P. R. Co. v. Davenport*, 51 Iowa, 451. As to the time when public lands granted to railroad companies become taxable, see *Kansas Pacific R. Co. v. Prescott*, 16 Wall. 603; *Union Pacific R. Co. v. Com'rs*, 98 U. S. 541 (modifying *Union Pacific R. Co. v. McShane*, 22 Wall. 444).

³ *Thomson v. Kansas Pacific R. Co.*, 9 Wall. 579; *Huntington v. Central Pacific R. Co.*, 2 Sawyer, 503; *People v. Central Pacific R. Co.*, 43 Cal. 398; *Western Union Telegraph Co. v. Richmond*, 26 Gratt. 1.

⁴ *Union Pacific R. Co. v. Peniston*, 18

Wall. 5 (three judges dissenting); *Union Pacific R. Co. v. Lincoln County*, 1 Dill. 314; *Huntington v. Central Pacific R. Co.*, 2 Sawyer, 503.

⁵ As to what is a compulsory payment, see *Union Pacific R. Co. v. Com'rs*, 98 U. S. 541; *Dickinson County v. National Land Co.*, 23 Kan. 196; *Vermont Cent. R. Co. v. Burlington*, 28 Vt. 193.

⁶ *Brewer v. Springfield*, 97 Mass. 152; *Loud v. Charlestown*, 99 Mass. 208; *Greene v. Mumford*, 5 R. I. 472; *Cook County v. Chicago, B., & Q. R. Co.*, 35 Ill. 460; *Chicago & N. W. R. Co. v. Fort Howard*, 21 Wis. 44; *Union Pacific R. Co. v. Lincoln County*, 2 Dill. 279; *State Railroad Tax Cases*, 92 U. S. 575, 613; *Parmley v. St. Louis, I. M., & S. R. Co.*, 3 Dill. 13.

of mere irregularities, hardship and injustice in the assessment, or errors or excess in valuation; and, indeed, these are, in most cases, not available in an action at law to a party resisting the tax. Nor will equity enjoin merely because the tax is void for non-compliance with material provisions of law.¹ Among the reasons for its abstinence in such cases is its inability to apportion the tax, or make or order a new assessment.²

The remedy by injunction should be granted only where the case can be brought under some recognized head of equity jurisprudence, as where there would otherwise be a cloud on the title, or a multiplicity of suits, or any irreparable injury.³ Other grounds for equitable intervention, which have been admitted under special circumstances, are that the tax was unauthorized by law, or assessed upon property not subject to taxation, or fraudulently assessed at too high a rate; and there has been a disposition to allow the remedy where grave constitutional questions were in issue.⁴

The equitable remedy has been sought to such an extent when there was no substantial question as to the validity of a part, even the greater part of the tax, thus delaying the collection of lawful taxes to the public detriment, that a rule has been adopted by the national tribunals that no injunction, preliminary or final, will be granted to stay the collection, unless it is made to appear that the portion of the tax, if any, which is conceded to be due, or which can be seen to be due on the face of the bill,

¹ *Chicago, B., & Q. R. Co. v. Frary*, 22 Ill. 34; *Ottawa v. Chicago & R. I. R. Co.*, 25 Ill. 43; *Cook County v. Chicago, B., & Q. R. Co.*, 35 Ill. 460; *Huck v. Chicago & A. R. Co.*, 86 Ill. 352; *Missouri River, Ft. S., & G. R. Co. v. Blake*, 9 Kan. 489; *Smith v. Leavenworth*, 9 Kan. 296; *Huntington v. Central Pacific R. Co.*, 2 Sawyer, 503.

² *State Railroad Tax Cases*, 92 U. S. 575, 614.

³ *Heywood v. Buffalo*, 14 N. Y. 534; *Susquehanna Bank v. Supervisors*, 25 N. Y. 312; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Dows v. Chicago*, 11 Wall. 108; *Hannewinkle v. Georgetown*, 15 Wall. 547; *State Railroad Tax Cases*, 92 U. S. 575, 614; *Huntington v. Central Pacific R. Co.*, 2 Sawyer, 503; *Missouri River, Ft. S., & G. R. Co. v. Morris*, 7 Kan. 210; *Missouri River, Ft. S., & G. R. Co. v.*

Wheaton, 7 Kan. 232; *Matheny v. Golden*, 5 Ohio St. 361; *Oliver v. Memphis & L. R. R. Co.*, 30 Ark. 128; *Morris Canal & B. Co. v. Jersey City*, 1 Beasley, 227. A bill to set aside a sale for illegal taxes and remove a cloud on the title was sustained in *Mobile & G. R. Co. v. Peebles*, 47 Ala. 317.

⁴ *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291; *Cook County v. Chicago, B., & Q. R. Co.*, 35 Ill. 460; *Chicago, B., & Q. R. Co. v. Cole*, 75 Ill. 591; *Porter v. Rockford, R. I., & St. L. R. Co.*, 76 Ill. 561; *North Carolina R. Co. v. Com'rs*, 82 N. C. 259; *Burlington & Mo. R. R. Co. v. County Com'rs*, 7 Neb. 487; *Louisville & N. R. Co. v. Gaines*, 3 Fed. Rep. 266, 12 Chicago Leg. News, 407. See *Toledo & W. R. Co. v. Lafayette*, 22 Ind. 262.

or can be shown on affidavits to be due, whether conceded or not, has been paid or tendered.¹

A stockholder may, in a case proper for equitable relief against illegal assessment, bring a suit in behalf of himself and other stockholders where the corporation refuses to take action, making the corporation a party.²

¹ State Railroad Tax Cases, 92 U. S. 575; Union Pacific R. Co. v. Lincoln County, 2 Dill. 279; Mobile & O. R. Co. v. Moseley, 52 Miss. 127. See Pelton v. National Bank, 101 U. S. 143; Cummings v. National Bank, 101 U. S. 153.

² Davenport v. Dows, 18 Wall. 626. See Paine v. Wright, 6 McLean, 395.

CHAPTER XIX.

THE POWERS OF THE CORPORATION.

Limited Powers of a Corporation. — A corporation is a creature of the law. Deriving its existence and faculties from the express grant of the legislature, it has only the powers so conferred, and all others are presumed to have been withheld.¹ That legislative grants to a corporation, whether of powers or exemptions, are to be strictly construed, so that nothing passes except what is given in clear and explicit terms, is a familiar doctrine which is applied with more stringency when the powers in question interfere with private rights or abridge important functions of government. A technical reason for this rule of construction is that the grant, being made by the State at the request of the citizen, is supposed to have been made in his language in a bill submitted by him, and therefore, in case of doubt or ambiguity, the construction should be against him; but a more substantial reason for the rule is that it tends to prevent improvident grants.

A distinction is taken between grants to a public body intended only for the public benefit, which are to be liberally construed, and grants to individuals and associations which, though they may result in incidental benefits to the community, are primarily designed for the profit of the grantees, and therefore invite a severer scrutiny.²

The Rule of Strict Construction of Corporate Powers, how to be applied. — The rule, which applies a strict construction to corporate grants, must, however, be understood in a reasonable sense as not requiring the power to be invariably conferred in express words, but admitting its existence when necessarily implied from any

¹ "Being the mere creature of law, it [the corporation] possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." *Dartmouth College v. Woodward*, 4 Wheat. 518, 636.

² *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294; *Galloway v. London*, L. R. 1 H. L. 34.

express grant. Corporations have, therefore, such powers as are specifically granted, and such as are reasonably necessary for the purpose of carrying into effect the powers expressly granted, and no other. The former, or powers specifically granted, are designated the express powers, and the latter, or those necessary to carry the specific powers into effect, as the implied or incidental powers.¹

The term "necessary" is not here used in a strict sense, so as to import an absolute physical necessity, or to designate only an implied power without which the specific power would be entirely inoperative; but it means only that the necessary power must be convenient, useful, and appropriate to the specific power.²

The rule of strict construction has been held not to apply to a statute which only authorizes a transfer of existing franchises without any grant of new powers.³ A charter granted by two States has been held entitled to a liberal construction.⁴ The construction which is given to a charter by the courts of the State which granted it is followed in other States.⁵

The rule of strict construction is enforced in England, where a railway act is regarded as a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and any ambiguity in the terms of the contract must

¹ 2 Kent Com. 298; *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339; *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126, 135; *State v. Balt. & O. R. Co.*, 6 Gill, 363; *Baltimore v. Balt. & O. R. Co.*, 21 Md. 50; *Perrine v. Chesapeake & D. Canal Co.*, 9 How. 172; *Holyoke Co. v. Lyman*, 15 Wall. 500, 512; *Delaware Tax Cases*, 18 Wall. 206; *St. Clair County Turnp. Co. v. Illinois*, 96 U. S. 63; *Delaware & R. Canal Co. v. Camden & A. R. Co.*, 1 C. E. Green, 321, 372; *Morris Canal & B. Co. v. Central R. Co.*, 1 C. E. Green, 419; *Morris & E. R. Co. v. Sussex R. Co.*, 5 C. E. Green, 542, 562; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 401, 9 C. E. Green, 455; *Auburn & C. Plank Road Co. v. Douglass*, 9 N. Y. 444; *Cleveland v. Norton*, 6 Cush. 380; *Commissioners on Inland Fisheries v. Holyoke Water Power Co.*, 104 Mass. 446; *Franklin Co. v. Lewiston Savings Bank*, 68 Me. 43; *New Orleans, F., & H. Steamship Co. v. Ocean Dry Dock Co.*, 28 La. An. 173; *Mobile & O.*

R. Co. v. Franks, 41 Miss. 494, 511; *Pacific R. Co. v. Seely*, 45 Mo. 212, 220; *Central R. Co. v. Collins*, 40 Ga. 582; *Attorney-General v. Great Eastern R. Co.*, L. R. 5 App. Cas. 473, L. R. 11 Ch. Div. 449. In *North Branch Passenger R. Co. v. City Passenger R. Co.*, 38 Pa. St. 361, a legislative promise, under which no right is acquired, is distinguished from a grant.

² *McCulloch v. Maryland*, 4 Wheat. 316, 413, Marshall, C. J.; *Curtis v. Leavitt*, 15 N. Y. 9, 64; *State v. Hancock*, 6 Vroom, 537, 545, 546; *Burrill's Law Dict.*, "Necessary." See *Hood v. New York & N. H. R. Co.*, 22 Conn. 1, 16; *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168, 176, 36 Barb. 420.

³ *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 402, 9 C. E. Green, 455.

⁴ *Brocket v. Ohio & P. R. Co.*, 14 Pa. St. 241, 244; *Cleveland & P. R. Co. v. Speer*, 56 Pa. St. 325.

⁵ *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 402, 9 C. E. Green, 455.

operate against the adventurers and in favor of the public; and the company can claim no power which is not clearly given by the act.¹

The rule of strict construction applies only in cases of doubt or ambiguity, or where a power is claimed by implication. There is no room for its operation where the power in question is expressly given, or where the legislative intention clearly appears from a clause or section or from the whole statute, or where the ambiguity can be removed by the settled rules of construction.² It is sometimes limited to powers which are against common right.³ The paramount rule to be followed in the exposition of statutes to which all others must yield is to ascertain, by a fair use of the understanding, the intent of the legislature from the whole statute, and then to give effect to that intent as far as the language admits, without reference to the policy of the law, of which the legislature alone is the judge.⁴ The words of a statute, when in common use, are to be taken in their natural, plain, obvious, and ordinary signification; and they are to be construed in the sense in which the legislature is accustomed to use them.⁵

The restrictions on the powers expressed in the charter are to be enforced against the company, although the effect is to render them worthless; and if they cannot be executed without disregarding the restrictions, they cannot be executed at all.⁶

Powers affecting the Public Interests. — A grant, the effect of which is to abridge important functions of government, is to be construed strictly. Thus, the power of taxation is essential to the support and existence of government; and a grant to the company of exemption therefrom is not to be presumed, and,

¹ *Stourbridge Canal Co. v. Wheeley*, 2 B. & Ad. 792; *Priestley v. Foulds*, 2 Man. & G. 175; *Galloway v. London*, L. R. 1 H. L. 34.

² *Camden & A. R. & T. Co. v. Briggs*, 2 Zab. 623, 644; *Cleveland, P., & A. R. Co. v. Erie*, 27 Pa. St. 380, 386; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 401, 9 C. E. Green, 455; *Rice v. Minn. & N. W. R. Co.*, 1 Black, 358; *Newhall v. Galena & C. U. R. Co.*, 14 Ill. 273; *New York & H. R. Co. v. Kip*, 46 N. Y. 546.

³ *Baltimore v. Balt. & O. R. Co.*, 21 Md. 50, 91; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230, 232.

⁴ *Cleaveland v. Norton*, 6 Cush. 380; *Rice v. Minn. & N. W. R. Co.*, 1 Black, 358; *Binghamton Bridge, In re*, 3 Wall. 51, 74, 75; *Home of the Friendless v. Rouse*, 8 Wall. 430, 437; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 401, 9 C. E. Green, 455; *Baltimore v. Balt. & O. R. Co.*, 21 Md. 50, 91; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230, 232; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210, 221.

⁵ *Phil. & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20, 59, 60.

⁶ *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. St. 339.

when given to a certain extent, is not to be extended by construction.¹ The same principle applies where the company asserts the grant of exclusive privileges conflicting with public interests, as of the sole power to operate a railroad within certain limits.² It governs also in the construction of a grant of public lands, where the meaning of its terms is in doubt.³ The grant of a franchise to a corporation whose duration is limited creates only an estate for its life.⁴

Power of Eminent Domain. — The power to take private property for public uses exists only when expressly conferred; and statutes which delegate it are not to be extended by inference or implication.⁵ It is not implied from a mere grant of corporate powers.⁶ Being in derogation of common right, it must be clearly conferred, and its terms and conditions must be strictly complied with.⁷ The grant, however, should be construed reasonably, so as not to defeat the evident purpose of the legislature;⁸ and where the mode of exercising the power and the selection of the property to be taken are left to the discretion of the company, the court will not revise its discretion and enjoin it, for the mere reason that it might obtain the same object in some other way.⁹ The presumption is against a construction of the grant which would relieve the company from liability to persons whose rights of property are impaired by its works.¹⁰ The power to take land expires with the limitation fixed by statute.¹¹

The charter of a corporation is not presumed to authorize it to create a nuisance,¹² or to exempt it from subordination to general laws.¹³

¹ *Ante*, Chap. XVIII. p. 481.

² *Ante*, Chap. XVII. p. 452, Chap. VII. p. 154.

³ *Rice v. Minn. & N. W. R. Co.*, 1 Black, 358; *Dubuque & P. R. Co. v. Litchfield*, 23 How. 66; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733.

⁴ *St. Clair County Turnp. Co. v. Illinois*, 96 U. S. 63.

⁵ *Ante*, Chap. VII. p. 145.

⁶ *Keyport & M. P. Steamboat Co. v. Farmers' Trans. Co.*, 3 C. E. Green, 13.

⁷ *Ante*, Chap. VII. p. 170; *Bonaparte v. Camden & A. R. Co.*, Baldwin, 229, 230; *Browning v. Camden & W. R. Co.*, 3 Green Ch. 47, 55; *Glover v. Boston*, 14 Gray, 282; *Scales v. Pickering*, 4 Bing. 448; *Webb v. Manchester & L. R. Co.*, 4

Mylne & C. 116, 120; *Lee v. Milner*, 2 Young & C. 611, 618.

⁸ *New York & H. R. Co. v. Kip*, 46 N. Y. 546; *ante*, Chap. VII. p. 145.

⁹ *Lamb v. North London R. Co.*, L. R. 4 Ch. App. 522; *New York & H. R. Co. v. Kip*, 46 N. Y. 546; *ante*, Chap. VII. pp. 148, 149.

¹⁰ *Salem v. Eastern R. Co.*, 98 Mass. 431; *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294; *Tinsman v. Belvidere Del. R. Co.*, 2 Dutcher, 148.

¹¹ *Ante*, Chap. VII. p. 145, Chap. IX. p. 255.

¹² *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Babcock v. New Jersey Stock Yard Co.*, 5 C. E. Green, 296.

¹³ *Tyng v. Commercial Warehouse Co.*,

The grant of the power to take land for a railroad is not presumed to authorize a substantial interference with earlier appropriations to a public use, as with highways or other railroads; but, if possible, a construction will be adopted by which both uses can stand together.¹ The power to interfere with the public right of navigation exists only when expressly given, or clearly implied as essential to the powers expressly granted, and when conferred is to be exercised with due regard to the public right. The power to cross navigable waters by bridge or ferry may be given expressly or by implication.² The power to divert streams of water which are not navigable is accompanied by the duty to restore them as far as practicable to their natural course, so as to avoid all unnecessary damage to land-owners or the public.³

The company may, under the authority of statute, and subject to its liability to make just compensation, do what is necessary and proper in the construction of its road.⁴ Thus, it is authorized to make the excavations and embankments which are required for such construction.⁵ The powers and obligations of the company in the exercise of the delegated right of eminent domain have been treated at length in earlier chapters.⁶

Power to construct Branches and Extensions.—The power to construct branches or extensions of the railroad is not incidental to the power to construct a railroad, but it may be conferred by statute; and whether it has been conferred, and if conferred, whether it expires with the power to construct the main road, is a question of statutory construction.⁷ The company, after de-

58 N. Y. 308; *De Lancey v. Insurance Co.*, 52 N. H. 581; *Johnson v. Griffin Banking & T. Co.*, 55 Ga. 691.

¹ *Ante*, Chap. VII. pp. 154-157, Chap. VIII. pp. 242, 243.

² *Ante*, Chap. VII. pp. 201, 202.

³ *Ante*, Chap. VII. pp. 203-205.

⁴ See authorities as to the scope of the special remedy which is appropriate only to authorized acts, *ante*, Chap. VII. pp. 174-177. As to powers derived by grant from the land-owner, see *ante*, Chap. VI. p. 133.

⁵ *Babcock v. Western R. Co.*, 9 Met. 553; *Curtis v. Eastern R. Co.*, 14 Allen, 55, 98 Mass. 428; *Henry v. Dubuque & P.*

R. Co., 2 Iowa, 288; *Jones v. Western Vt. R. Co.*, 27 Vt. 399.

⁶ Chaps. VII., VIII.

⁷ *Works v. Junction R. Co.*, 5 McLean, 425; *Baltimore & H. Turnp. Co. v. Union R. Co.*, 35 Md. 224; *Pittsburg v. Penn. R. Co.*, 48 Pa. St. 355; *Morris & E. R. Co. v. Central R. Co.*, 2 Vroom, 205; *Attorney-General v. West Wisconsin R. Co.*, 36 Wis. 466; *Platteville v. Galena & S. W. R. Co.*, 43 Wis. 493; *State v. St. Louis, K. C., & N. R. Co.*, 3 Mo. App. 180; *Atlantic & P. R. Co. v. St. Louis*, 3 Mo. App. 315, 66 Mo. 228; *ante*, Chap. VII. pp. 150, 151; Chap. IX. pp. 255, 256.

termining the location, cannot change it, except under authority of statute.¹

Powers within the Location. — The company may use its location for all the purposes of a railroad,² and may exercise its discretion while keeping within such purposes.³ The power to maintain the railroad includes the power to make improvements consistent with the purpose of the undertaking.⁴ The company cannot use the location for other than railroad purposes.⁵ It cannot justify acts within the location injurious to land not taken which are not reasonably necessary to the proper construction and maintenance of the railroad.⁶

Power as to Land limited generally to the Location. — The company's power to enter on and use real estate is limited to its location.⁷ It cannot lawfully interfere with private rights outside of it;⁸ as by appropriating a temporary right of way,⁹ or materials for construction from land not taken,¹⁰ or by digging ditches outside of the location for drainage or the protection of the railroad.¹¹ A grant of power to maintain a railroad gives to the company no interest or easement in the land of the adjoining proprietor, or right to restrict his lawful use of his property.¹²

Power to alienate its Franchise and Railroad. — The company cannot, according to the current of the decisions, without special authority of statute, alienate its franchise, or property acquired under the right of eminent domain, or essential to the performance of its duty to the public, whether by sale, mortgage, or lease;¹³

¹ *Ante*, Chap. IX. pp. 254, 255.

² *Ante*, Chap. VII. pp. 159, 161.

³ *Wright v. Scott*, 34 Eng. L. & Eq. 1, 18 Cas. Ct. Session, 2d Series (H. L.), 45.

⁴ *Sevenoaks, M., & T. R. Co. v. London, C., & D. R. Co.*, L. R. 11 Ch. Div. 625.

⁵ *Bostock v. North Staffordshire R. Co.*, 3 Smale & G. 283, 4 El. & Bl. 798, in which the company was held not authorized to use for aquatic amusements a reservoir formed for supplying its canals with water. See *Mulliner v. Midland R. Co.*, L. R. 11 Ch. Div. 611.

⁶ *Curtis v. Eastern R. Co.*, 14 Allen, 55, 98 Mass. 428; *Bostock v. North Staf-*

fordshire R. Co., 4 El. & Bl. 798; *Norton v. London & N. W. R. Co.*, L. R. 9 Ch. Div. 623, 13 Ch. Div. 268; *Fenwick v. East London R. Co.*, L. R. 20 Eq. Cas. 544; *ante*, Chap. VII. p. 160.

⁷ *Ante*, Chap. X. p. 266, Chap. VII. p. 160.

⁸ *Hazen v. Boston & M. R.*, 2 Gray, 574; *St. Peter v. Denison*, 58 N. Y. 416.

⁹ *Currier v. Marietta & C. R. Co.*, 11 Ohio St. 228.

¹⁰ *Parsons v. Howe*, 41 Me. 218.

¹¹ *State v. Armell*, 8 Kan. 288; *Hills v. Boston & M. R.*, 18 N. H. 179.

¹² *Auburn & C. Plank Road Co. v. Douglass*, 9 N. Y. 444.

¹³ *Thomas v. West Jersey R. Co.*, 101

and it cannot even grant an easement within its location to individuals or the public.¹ But it can, it has been held, in connection with the owner of the fee, dedicate for a public highway land which it has taken under the right of eminent domain.²

Power to hold Property and maintain a Railroad in a Foreign State.

—A corporation may, when authorized by the law which created it, hold property in a foreign State when admitted to do so by its law or policy,³ and may be invested by such State with the power to construct and maintain a railroad, and take private property therefor.⁴

Power to establish By-laws.—The company has an implied power to establish by-laws, but whether the power is conferred expressly or by implication, it is limited to such as are lawful and reasonable.⁵ It cannot by a by-law control the jurisdiction of courts,⁶ or without special statute authority declare a forfeiture of shares of capital stock for non-payment of calls.⁷ It may regulate the mode of transferring shares, but it cannot unreasonably restrict the power of transfer.⁸ The power to alter and repeal by-laws is limited to the making of such new by-laws as are reasonable, and cannot be used to divest rights acquired under the by-law which is amended or repealed.⁹ If the by-law is separable

U. S. 71; *York & M. L. R. Co. v. Wilians*, 17 How. 30; *Pearce v. Madison & I. R. Co.*, 21 How. 441; *Pullan v. Cincinnati & C. A. L. R. Co.*, 4 Biss. 35; *Commonwealth v. Smith*, 10 Allen, 448; *Richardson v. Sibley*, 11 Allen, 65; *Midlesex R. Co. v. Boston & C. R. Co.*, 115 Mass. 347; *Vermont & C. R. Co. v. Vt. Cent. R. Co.*, 34 Vt. 1, 47; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 399, 9 C. E. Green, 455; *Stewart's Appeal*, 56 Pa. St. 413; *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126; *Wood v. Bedford & B. R. Co.*, 8 Phil. 94; *State v. Consolidation Coal Co.*, 46 Md. 1; *Hays v. Ottawa, O., & F. R. V. R. Co.*, 61 Ill. 422; *Atlantic & P. Tel. Co. v. Union Pacific R. Co.* (U. S. C. C., D. Neb.), 1 Fed. Rep. 745; *Mulliner v. Midland R. Co.*, L. R. 11 Ch. Div. 611. But see *Shepley v. Atlantic & St. L. R. Co.*, 55 Me. 395; *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 Me. 9; *Hall v. Sullivan R. Co.*, 21 Law Reporter, 138; *Miller v. Rut-*

land & W. R. Co., 36 Vt. 452; *Bardstown & L. R. Co. v. Metcalfe*, 4 Met. (Ky.) 199; *State v. North Carolina R. Co.*, 72 N. C. 634. A general authority conferred by the charter to purchase lands was held to authorize the purchase of a railroad. *Branch v. Atlantic & G. R. Co.*, 3 Woods, 481.

¹ *Sapp v. Northern Cent. R. Co.*, 51 Md. 115; *ante*, Chap. IX. p. 260.

² *Green v. Canaan*, 29 Conn. 157.

³ *Ante*, Chap. I. p. 14.

⁴ *Ante*, Chap. VII. pp. 144, 145.

⁵ *Chandler v. Northern Cross R. Co.*, 18 Ill. 190; *Kennebec & P. R. Co. v. Kendall*, 31 Me. 470; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 178, 182; *Williams v. Great Western R. Co.*, 13 Exch. 10; *Angell & A. on Corp. ch. x.*

⁶ *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 6 Gray, 596.

⁷ *Ante*, Chap. III. pp. 85, 86.

⁸ *Ante*, Chap. V. pp. 112, 129.

⁹ *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 182.

in its character, it may be void in part, and otherwise valid.¹ The power to make by-laws is, in the absence of a contrary usage or statute provision, with the body of members, and not with the directors.²

Power to issue Shares of Stock.—The power to issue shares of capital stock is limited to the number fixed by law.³ The power to issue preferred stock, according to the weight of authority, exists only under statutes; but stockholders may by acquiescence waive the right to object to an unauthorized issue.⁴ The power to pay interest on the stock exists only when conferred by statute.⁵ The power to enforce the payment of subscriptions has been already treated.⁶

Power to take Tolls.—The power to take tolls must be expressly given, and when so given is, in case of doubt or ambiguity, to be construed favorably to the public.⁷ Tolls are to be distinguished from rates of transportation, being a tribute for a privilege, as a right of passage, and not, like freight or fares, a payment for a service.⁸

Power to discriminate in Charges for Transportation.—A railroad company, being under a public obligation as a common carrier, and being in a certain sense a public agent in consequence of holding by delegation the power of eminent domain, is required to treat the public with equality and fairness. It cannot discriminate in the transportation of persons and merchandise by giving special privileges to one which it denies to another,⁹ or by

¹ *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 6 Gray, 596.

² *Morton Gravel Road Co. v. Wysong*, 61 Ind., 4.

³ *Ante*, Chap. V. pp. 127, 128.

⁴ *Ante*, Chap. V. p. 124.

⁵ *Ante*, Chap. V. p. 126.

⁶ *Ante*, Chap. III. pp. 81–86.

⁷ *Stourbridge Canal Co. v. Wheeley*, 2 B. & Ad. 792; *Barrett v. Stockton & D. R. Co.*, 2 Man. & G. 134, 3 Man. & G. 956; *Portsmouth Bridge Co. v. Nance*, 6 Man. & G. 229; *Perrine v. Chesapeake & D. Canal Co.*, 9 How. 172; *Camden & A. R. Co. v. Briggs*, 2 Zab. 623; *Bridge Co. v. Hoboken Co.*, 2 Beasley, 81, 503, 1 Wall. 116; *Penn. R. Co. v. National R. Co.*, 8 C. E. Green, 441; *Blake v. Winona*

& St. P. R. Co., 19 Minn. 418; *Munn v. Illinois*, 94 U. S. 113, 126.

⁸ *Boyle v. Phil. & R. R. Co.*, 54 Pa. St. 310; *Cumberland Valley R. Co.'s Appeal*, 62 Pa. St. 218; *Camblos v. Phil. & R. R. Co.*, 4 Brewster, 563. See *Johnson v. Hudson River R. Co.*, 2 Sweeney, 298, where the power to demand fare of a passenger is said not to be one which can be implied; but *quære*.

⁹ *Sandford v. Catawissa, W., & E. R. Co.*, 24 Pa. St. 378; *Audenried v. Phil. & R. R. Co.*, 68 Pa. St. 370; *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188; *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365.

charging for the same service higher rates to some than to others.¹

This rule is not to be inexorably applied so as, provided the rate is reasonable for all, to exclude contracts for transportation at a less rate in special cases, where under the circumstances the discrimination appears reasonable.² It does not exclude arrangements for through traffic which provide for transportation at a less rate than is charged upon local freight.³

The company's right to make and, using reasonable force, to execute regulations in the transportation of passengers and the use of its stations belongs to a specific treatment of its duties and liabilities as a common carrier, rather than to the consideration of its general powers.

Power to make Contracts. — Corporations have an implied power to make such contracts as are usual and necessary for carrying into effect the purposes for which they were created.⁴ A railroad corporation is usually authorized to make contracts by an express provision of statute; but in the absence of such a provision the power is implied as necessary and incidental to the express power to locate, construct, maintain, and work a railroad. The power, whether express or implied, must, in view of the purposes and methods of such an enterprise, be allowed a liberal scope.⁵ The company, by custom and necessity, conducts operations which are extensive and miscellaneous. It holds wide relations with local and general business. It is often designed not merely to convey passengers and goods upon its own road, but to be a part of an extended line of transportation. Its capacity to make contracts cannot, therefore, be measured by the narrow and rigid rules which were applied at an early day to business or commercial corporations, still less by those which govern municipal and

¹ *Messenger v. Penn. R. Co.*, 7 Vroom, 407; *Cumberland Valley R. Co.'s Appeal*, 62 Pa. St. 218, 230; *Camblos v. Phil. & R. R. Co.*, 4 Brewster, 563, 622; *Vincent v. Chicago & A. R. Co.*, 49 Ill. 33. For the construction of the English statutes which prohibit unequal charges, see *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226, where the earlier cases are reviewed.

² *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Sargent v. Boston & L. R. Co.*, 115

Mass. 416, 422; *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430, 451, 452; *Eclipse Towboat Co. v. Pontchartrain R. Co.*, 24 La. An. 1.

³ *Shipper v. Penn. R. Co.*, 47 Pa. St. 338; *Stewart v. Erie & W. Trans. Co.*, 17 Minn. 372.

⁴ *Angell & A. on Corp.* § 271.

⁵ *South Wales R. Co. v. Redmond*, 10 C. B. N. s. 675, 685; *Baltimore v. Balt. & O. R. Co.*, 21 Md. 50, 91.

eleemosynary corporations.¹ The courts, while in theory adhering to the ancient formula which defines the power of a corporation to make contracts, or bind itself by them, in fact deprive it of its legal force by a liberal application of the doctrine of estoppel.²

The Extent and Limit of the Power to make Contracts, how determined. — The power of a corporation, in respect to contracts and business dealings, extends not merely to those which are absolutely essential or indispensable to the performance of the specified acts authorized by its charter, but as well to those which, not being prohibited by statute or public policy, are designed and may be useful to promote the main enterprise.³ The choice of means which are reasonably promotive of the main purpose is

¹ A corporation authorized to boom lumber, it was held, could not recover for driving lumber. *Bangor Boom Co. v. Whitney*, 29 Me. 123. A corporation authorized to maintain a turnpike and keep a hotel was held not authorized to be a carrier on the turnpike, and, therefore, not liable for the price of wagons purchased for the purpose of carrying passengers on it. *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Wiswall v. Greenville & R. Plank Road Co.*, 3 Jones Eq. (N. C.) 183. In *McCullough v. Moss*, 5 Denio, 567, a corporation for smelting ore was held not bound by a promissory note, unless it was made affirmatively to appear that it was given in the course of its business. In *Penn., D., & M. Steam Nav. Co. v. Dandridge*, 8 Gill & J. 248, 319, a company incorporated to transport passengers and merchandise between Baltimore and Philadelphia was held not bound by a contract to break the ice and tow from the port of Baltimore a vessel destined for Virginia; and the doctrine was stated, that a corporation can make no contract which is not necessary, either directly or incidentally, to enable it to answer the purpose of its charter, and that it is not estopped from denying its capacity. See *Boyce v. Trustees, &c., M. E. Church*, 46 Md. 359, 373. Of a similar tenor with the above cases are: *Strauss v. Eagle Ins. Co.*, 5 Ohio St. 59; *Abbott v. Balt. & R. Steam Packet Co.*, 1 Md. Ch. 542; *Madison, W., & M. Plank Road Co. v. Watertown & P. Plank Road Co.*, 7

Wis. 59, 5 Wis. 178; *Dietrich v. Madison Relief Assoc.*, 45 Wis. 79; *Orleans, F., & H. Steamship Co. v. Ocean Dry Dock Co.*, 28 La. An. 173; *Toll Bridge Co. v. Osborn*, 35 Conn. 7; *Hood v. New York & N. H. R. Co.*, 22 Conn. 502 (considered in *Converse v. Norwich & N. Y. Trans. Co.*, 33 Conn. 166, 179); *Pearce v. Madison & I. R. Co.*, 21 How. 441; *Franklin Co. v. Lewiston Savings Bank*, 68 Me. 43. See *Angell & A. on Corp.* § 256. In *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 433, Coleridge, J., said: "When one considers the immense extension and increase of corporate bodies in modern times, the vast variety of purposes for which they are created, the complication of circumstances under which they are to act, the liability to error in the formation of prospective plans as to detail, and the ever-arising improvements in the means and appliances of mechanics and science, it would seem that public convenience and policy, as well as good sense and justice, require that, within the limits of a substantial adherence to purpose, the empowering clauses of incorporating instruments should be construed largely and liberally, so as not to defeat the purpose by a too narrow restriction of the means."

² *Post*, pp. 516-519.

³ *Brown v. Winnisimmet Co.*, 11 Allen, 326, 334; *Buffet v. Troy & B. R. Co.*, 40 N. Y. 168, 36 Barb. 420, 423, 424; *Smith v. Nashua & L. R. Co.*, 27 N. H. 86, 94.

with the corporation; and, where different methods stand this test, judicial tribunals will not revise its discretion by holding that the one chosen was not indispensable and that another might have been more wisely taken.¹

Some rules for determining the power of railroad corporations to make contracts, which have been stated in judicial opinions, deserve notice in this connection.

The contracts of a corporation are presumed to be within its power, and the burden of showing its incapacity by the terms of the charter is on the party who denies their validity. The want of power may be expressly declared by statute, or implied from the nature and objects of the corporate body. The inquiry in some English cases is said to be, not whether the contract was authorized, but whether it was forbidden.²

Contracts, it is said, should be clearly outside of the objects of the charter, in order to be held invalid between the corporation and innocent third parties as in excess of corporate powers.³

Another test is as follows: If the contract is judicially perceived from its terms to be necessarily unconnected with the purpose of the incorporation, namely, the making, maintaining, and working the railway, both parties must have known it to be

¹ *Baltimore v. Balt. & O. R. Co.*, 21 Md. 50, 92; *Curtis v. Leavitt*, 15 N. Y. 9, 65; *Madison, W., & P. Plank Road Co. v. Watertown & P. Plank Road Co.*, 5 Wis. 173; *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 432, 433, *Coleridge, J.*

² *Miss. & M. R. Co. v. Howard*, 7 Wall. 392, 412; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 267; *Morris & E. R. Co. v. Sussex R. Co.*, 5 C. E. Green, 542, 4 C. E. Green, 13, 574; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230, 234; *Strauss v. Eagle Ins. Co.*, 5 Ohio St. 59, 62; *Alabama Gold Life Ins. Co. v. Central A. & M. Assoc.*, 54 Ala. 73; *South Wales R. Co. v. Redmond*, 10 C. B. n. s. 675, 682, *Erle, J.*; *Shrewsbury & B. R. Co. v. North Western R. Co.*, 6 H. L. Cas. 113, 124, 135, 137, 2 MacN. & G. 324, 17 Q. B. 652; *South Yorkshire R. & River Dun Co. v. Great Northern R. Co.*, 9 Exch. 55, 88, *Parke, B.*; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331, 381; *Bateman v. Ashton-under-Lyne*, 3 Hurl. & N. 323. See *Kitchen v. Cape Girardeau & S. L. R. Co.*, 59 Mo. 514. In *Scottish North Eastern R. Co. v. Stew-*

art, 3 Macq. 382, 415, *Lord Wensleydale (Parke, B.)* said: "There can be no doubt that a corporation is fully capable of binding itself by any contract, . . . except when the statutes by which it is created or regulated, expressly or by necessary implication, prohibit such contract between the parties. *Prima facie*, all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided. This is the doctrine of *ultra vires*, and is, no doubt, sound law, though the application of it to the points of each particular case has not always been satisfactory to my mind." In *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 384, *Blackburn, J.*, said: "I think, therefore, we are entitled to consider the question to be, not whether the present defendants had, by virtue of their acts of incorporation, authority to make the contract, but whether they are by those statutes forbidden to make it." His language on p. 362 is to the same effect.

³ *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331, 381, 382; *Cary v. Cleveland & T. R. Co.*, 29 Barb. 35, 52.

so, and it is deemed to be prohibited; but if it cannot be judicially perceived to be so unconnected, illegality is not to be presumed.¹

According to a statement of the rule which finds favor in later English authorities, a corporation created for particular purposes and with special powers cannot lawfully make, and is not bound by contracts if it appears by the express provisions of the statute creating it, or by necessary or reasonable inference, that the legislature meant that they should not be made; but unless it so appears, the corporation is bound.² The *prima facie* right to make a contract does not exist where, from the nature and objects of the incorporation appearing on the face of the act, the corporation is expressly or impliedly forbidden to make it.³

¹ *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 414, 415, 419, 420. A test varying little from this may be found in *Bissell v. Mich. S. & N. I. R. Co.*, 22 N. Y. 258, 290, *Selden, J.*; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 586, 587; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258.

² *South Yorkshire R. & River Dun Co. v. Great Northern R. Co.*, 9 Exch. 55, 84, *Parke, B.* (1853); *Bateman v. Ashton-under-Lyne*, 3 Hurl. & N. 323 (1858); *Shrewsbury & B. R. Co. v. North Western R. Co.*, 6 H. L. Cas. 113, 136; *Chambers v. Manchester & M. R. Co.*, 5 Best & S. 588 (1864); *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 370, 374, 383, 384; *Brown v. Winnisimmet Co.*, 11 Allen, 326, 331. In *South Wales R. Co. v. Redmond*, 10 C. B. N. s. 675, 682 (1861), *Erle, J.*, said: "Corporations have at law capacity to make all contracts not expressly or impliedly prohibited; and, therefore, contracts frustrating or necessarily inconsistent with the object for which a company is incorporated by an act are impliedly prohibited by it."

³ In *Shrewsbury & B. R. Co. v. North Western R. Co.*, 6 H. L. Cas. 113, *Lord Cranworth* said: "*Prima facie*, a corporation may contract under seal. You must show that the particular contract is one which the corporation has no power to enter into. It must be shown on the face of it to be a breach of duty, something foreign to the object for which the company was established." p. 124. Again: "*Prima facie* corporate bodies are

bound by all contracts under their common seal. When the legislature constitutes a corporation it gives to that body, *prima facie*, an absolute right of contracting. But this *prima facie* right does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making; such a contract is said to be *ultra vires*. And the question here, as in similar cases, is, whether there is anything on the face of the act of incorporation which expressly or impliedly forbids the making of the contract sought to be enforced." p. 135. See *Riche v. Ashbury R. Carriage & Iron Co.*, L. R. 9 Exch. 224, 264, 292; *Hare v. London & N.W. R. Co.*, 2 Johns. & H. 80, 105, 106. In *Chambers v. Manchester & M. R. Co.*, 5 Best & S. 588, *Crompton, J.*, held that a corporation is bound by the seal being affixed to the deed, where the directors have power given them so to affix it; but that it is not bound where the legislature has said that the thing shall not be done. In *Attorney-General v. Great Eastern R. Co.*, L. R. 5 App. Cas. 478, 478, *Selborne, Lord Chancellor*, said, that the doctrine of *ultra vires* "ought to be reasonably, and not unreasonably, understood and applied; and that whatever may be fairly regarded as incidental to or consequential upon those things which the legislature has authorized, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*."

Power to sell or mortgage Property.—A corporation has the power, except as restricted by legislation or some limitation arising from its purposes or nature, to sell, convey, or mortgage its property, real and personal.¹ It may, unless so restricted, dispose of such property by a single sale, as well as in parcels.² A railroad corporation has this power to the same extent as other corporations, except that in most jurisdictions it is not permitted, without legislative authority, to sell its franchises, including its right of way and other property essential to such franchises.³

Power to contract Debts, give Promissory Notes, and issue Bonds.—A railroad corporation, unless specially restrained by statute, may contract debts by obtaining credit in the course of its business or borrowing money, and may give as evidence of its debts the same forms of obligations as an individual. Thus, it may bind itself by promissory notes, bills of exchange, and negotiable bonds.⁴

¹ *Pierce v. Emery*, 32 N. H. 484, 503; *Boston, C., & M. R. Co. v. Gilmore*, 37 N. H. 410, 420; *Richards v. Merrimack & C. R. R. Co.*, 44 N. H. 127, 135; *Coe v. Columbus, P., & I. R. Co.*, 10 Ohio St. 372, 377; *Commonwealth v. Smith*, 10 Allen, 448, 455; *Hendee v. Pinkerton*, 14 Allen, 381; *Dupee v. Boston Water Power Co.*, 114 Mass. 37; *Miller v. Rutland & W. R. Co.*, 36 Vt. 452, 473; *White Water Valley Canal Co. v. Vallette*, 21 How. 414, 424; *Jones v. Guaranty & I. Co.*, 101 U. S. 622; *Joy v. Jackson & M. Plank Road Co.*, 11 Mich. 155, 165; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 410, 9 C. E. Green, 455; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42; *Wood v. Bedford & B. R. Co.*, 8 Phil. 91; *West v. Madison County Ag. Board*, 82 Ill. 205; *Kelly v. Ala. & C. R. Co.*, 58 Ala. 489; *Yates v. Van De Bogert*, 56 N. Y. 526. It may, when its charter gives it the general power to make all contracts which its convenience or interest may require, sell and pledge a note and mortgage held by it: *Uncas National Bank v. Rith*, 23 Wis. 339; or any choses in action: *Morris v. Cheney*, 51 Ill. 451; *Downie v. Hoover*, 12 Wis. 174.

² *Treadwell v. Salisbury Man. Co.*, 7 Gray, 393; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Buford v. Keokuk N. L. Packet Co.*, 3 Mo. App. 159; *Ardesco Oil Co. v. North Am. Oil & M. Co.*, 66 Pa. St. 375; *Wilson v. Miers*, 10 C. B. N. S.

349; *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, L. R. 1 Eq. Cas. 318.

³ See cases cited *ante*, p. 496, note 13.

⁴ *Richards v. Merrimack & C. R. R. Co.*, 44 N. H. 127, 135; *Commonwealth v. Smith*, 10 Allen, 448, 455; *McMasters v. Reed*, 1 Grant, 36; *White Water Valley Canal Co. v. Vallette*, 21 How. 414, 424; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 40 Barb. 179; *Curtis v. Leavitt*, 15 N. Y. 9; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 177; *Partridge v. Badger*, 25 Barb. 146, 170; *Wood v. Whelan*, 93 Ill. 153; *Marion & M. R. Co. v. Dodge*, 9 Ind. 163; *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359; *Alabama Gold Life Ins. Co. v. Central A. & M. Assoc.*, 54 Ala. 73; *Kelly v. Alabama & C. R. Co.*, 58 Ala. 489; *Branch v. Atlantic & G. R. Co.*, 3 Woods, 481. See *Smead v. Indianapolis, P., & C. R. Co.*, 11 Ind. 104. *Contra*, in England, *Bateman v. Mid-Wales R. Co.*, L. R. 1 C. P. 499. The power to borrow money is not restricted by a clause in the charter limiting the assessment of shares to a certain amount, and providing that other funds required shall be raised by the issue of new shares. *Richards v. Merrimack & C. R. R. Co.*, 44 N. H. 127. The company may take and negotiate promissory notes. *Frye v. Tucker*, 24 Ill. 180; *Goodrich v. Reynolds*, 31 Ill. 490; *Hardy v. Merriweather*, 14 Ind. 203.

If the statute prescribes the conditions on which the power to issue bonds shall be exercised, it must be complied with.¹ The company may sell the bonds which it is authorized to issue, directly or indirectly, without the intervention of a third party, either within or without the State.² A corporation is liable upon an accommodation note to a *bona fide* holder who, paying value, took it before maturity.³

Power to lend Surplus Funds, to compromise Disputes.—A railroad corporation may lend its surplus funds.⁴ It may compromise disputes, even with a subscriber to its stock, where the settlement is made in good faith, and does not work a fraud on creditors or other subscribers.⁵ It may pay for injuries and losses for which it is not legally liable.⁶

Power to guarantee the Bonds of other Corporations.—A railroad corporation has the power, in the course of its business and with a view to promote its lawful purposes, to guarantee the bonds of other corporations; and even when made for the accommodation of another company, they are valid in the hands of a *bona fide* holder.⁷ When taking the lease of the railroad of another corporation, it can, as a part of the transaction, guarantee the latter's bonds.⁸ It may guarantee municipal bonds issued in payment of

¹ Commonwealth v. Smith, 10 Allen, 448; Chambers v. Manchester & M. R. Co., 5 Best & S. 588. See Rockwell v. Elkhorn Bank, 13 Wis. 653. The *bona fide* holder of the stolen bond may recover against the company the whole amount thereof, and is not limited to the amount paid by him. Grand Rapids & I. R. Co. v. Sanders, 17 Hun, 552. As to facts affecting with notice the *bona fide* holder of a bond stolen before its issue, see Parsons v. Jackson, 99 U. S. 434.

² Bank of Ashland v. Jones, 16 Ohio St. 145. See Commissioners v. Atlantic & N. C. R. Co., 77 N. C. 289.

³ Monument Nat. Bank v. Globe Works, 101 Mass. 57; Mechanics' Banking Assoc. v. New York & S. White Lead Co., 35 N. Y. 505.

⁴ North Carolina R. Co. v. Moore, 70 N. C. 6.

⁵ Ante, Chap. III. pp. 76, 77.

⁶ Taunton v. Royal Ins. Co., 2 Hem. & M. 135; Attorney-General v. Great

Eastern R. Co., L. R. 11 Ch. Div. 449, 480.

⁷ Madison & I. R. Co. v. Norwich Savings Bank, 24 Ind. 457; Cozart v. Georgia R. & B. Co., 54 Ga. 379; Arnot v. Erie R. Co., 67 N. Y. 315, 5 Hun, 608. See Smead v. Indianapolis, P., & C. R. Co., 11 Ind. 104; Madison, W., & M. Plank Road Co. v. Watertown & P. Road Co., 7 Wis. 59, 5 Wis. 173; West of England Bank, *In re*, L. R. 14 Ch. Div. 317. A railway company cannot, in England, guarantee the parliamentary expenses or the profits and stock of another company. Maunsell v. Midland G. W. R. Co., 1 Hem. & M. 130; Colman v. Eastern Counties R. Co., 10 Beav. 1. For the construction of a statute authorizing one corporation to aid another, see Baltimore v. Balt. & O. R. Co., 21 Md. 50.

⁸ Low v. Central Pacific R. Co., 52 Cal. 53; Opdyke v. Pacific R. Co., 3 Dill. 55.

subscriptions to its capital stock.¹ It may, when authorized by statute to aid in the construction of a connecting railroad, by a subscription to the capital stock of the corporation owning it or "otherwise," guarantee the bonds of the latter, and where, as a condition of such right to aid, the vote of its stockholders in favor thereof is required, a subsequent vote ratifying a guaranty made by the directors on its behalf was held equivalent to a previous vote authorizing the guaranty.²

Power of the Company to purchase and hold its own Stock.—A corporation, not being prohibited by statute and acting *bona fide*, may purchase its own stock and reissue it.³ Generally the corporation becomes the owner of its stock by receiving it in payment of debts or as the consideration of property sold. Such a transaction in the ordinary course of business is not open to objection, but the power of the corporation to hold its own stock should be treated as subject to limitation and restraint; and some authorities confine it to stock received in payment of debts.⁴ The right to vote on shares held by the company, or by others in trust for it, is, as has already been seen, suspended while they are so held.⁵

Power to purchase and hold the Stock of other Corporations.—The purchase by the company of the capital stock of other corporations, when not prohibited by statute, may be allowed to a limited extent and for an incidental purpose; but when involving a misappropriation of the corporate funds, or being a mere speculation or induced by a vicious purpose, will be enjoined at the

¹ *Miss. & M. R. Co. v. Howard*, 7 Wall. 392. *Dupee v. Boston Water Power Co.*, 114 Mass. 37.

² *Zabriskie v. Cleveland, C., & C. R. Co.*, 23 How. 381; *Conn. Mut. Life Ins. Co. v. Cleveland, C., & C. R. Co.*, 41 Barb. 9. See *East Boston Freight R. Co. v. Eastern R. Co.*, 13 Allen, 422.

³ *Chicago, P., & S. W. R. Co. v. Marseilles*, 84 Ill. 145, 643; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *State v. Smith*, 48 Vt. 266; *City Bank v. Bruce*, 17 N. Y. 507; *State Bank v. Fox*, 3 Blatch. 431; *Williams v. Savage Man. Co.*, 3 Md. Ch. 418, 452; *Hartridge v. Rockwell*, R. M. Charlton, 260; *Taylor v. Miami Exporting Co.*, 6 Ohio, 176; *Iowa Lumber Co. v. Foster*, 49 Iowa, 25;

⁴ *Barton v. Port Jackson & U. F. Plank Road Co.*, 17 Barb. 397; *German Savings Bank v. Wulfekuhler*, 19 Kan. 60; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *Peterson v. Ill. L. & L. Co.*, 6 Brad. (Ill.) 257; *State v. Building Assoc.*, 35 Ohio St. 258. In England, the power exists only when expressly conferred. *London, H., & C. E. Bank, In re*, L. R. 5 Ch. App. 444; *Marseilles Extension R. Co., In re*, L. R. 7 Ch. App. 161; *Hope v. International Fin. Society*, L. R. 4 Ch. Div. 327; *Bonnington Sugar Refining Co. v. Thompson*, 6 Cas. Ct. Sessions, 4th Ser. 80.

⁵ *Ante*, Chap. II. p. 25.

instance of stockholders.¹ By some authorities such investments have been held altogether unauthorized.²

Power to hold Real Estate. — The power to hold real estate is limited to the proper and necessary uses of the company, such as for the location, materials for construction, station grounds, and other like purposes, and does not extend to the purchase of land as an investment or speculation.³ The company's power to hold real estate acquired by purchase may be more extensive than its power to condemn private property under the right of eminent domain, and may include the right to hold land to be used for the construction of dwelling-houses for its officers and employees, for shops in which its cars and engines may be made, and for slips for the accommodation of vessels from which it receives, or to which it delivers freight.⁴ The company may, with the view of increasing its business, buy land for the purpose of selling the gravel therefrom to persons who are to pay for its transportation over the railroad, and afterwards sell the land and enforce in equity the contract of sale.⁵ Even when created for a limited period, it may purchase, hold, and convey a title in fee-simple.⁶

Where a corporation is authorized to purchase land for certain purposes, and uses the power, the presumption is, that the power

¹ *Hodges v. New England Screw Co.*, 1 R. I. 312, 3 R. I. 9; *Ryan v. Leavenworth, A., & N. W. R. Co.*, 21 Kan. 365, 400; *Barned's Banking Co., In re*, L. R. 3 Ch. App. 105; *Royal Bank of India's Case*, L. R. 4 Ch. App. 252, L. R. 7 Eq. Cas. 91. See *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. Cas. 381.

² *Sumner v. Marcy*, 3 Wood. & M. 105; *New Orleans, F., & H. Steamship Co. v. Ocean Dry Dock Co.*, 28 La. An. 173; *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, G., & N. A. R. Co.*, 43 Ga. 13; *Mutual Savings Bank & B. Assoc. v. Meriden Agency Co.*, 24 Conn. 159; *Franklin Co. v. Lewiston Savings Bank*, 68 Me. 43. Corporations have been authorized by statutes to make such investments. *Zabriskie v. Cleveland, C., & C. R. Co.*, 23 How. 381; *Baltimore v. Balt. & O. R. Co.*, 21 Md. 50; *White v. Syracuse & U. R. Co.*, 14 Barb. 559.

³ *Overmyer v. Williams*, 15 Ohio 26; *State v. Newark, 1 Dutcher*, 315; *Taber v. Cincinnati, L., & C. R. Co.*, 15

Ind. 459; *Waldo v. Chicago, St. P., & F. R. Co.*, 14 Wis. 575; *Blunt v. Walker*, 11 Wis. 334; *Pacific R. Co. v. Seely*, 45 Mo. 212; *Norwich v. Norfolk R. Co.*, 4 El. & B. 397; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331.

⁴ *Eldridge v. Smith*, 34 Vt. 484; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 410, 9 C. E. Green, 455; *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337. See *Spear v. Crawford*, 14 Wend. 20. It has been suggested that the company may supply a chapel and theatre for the benefit of its workmen. *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775, 793; *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 415.

⁵ *Old Colony R. Co. v. Evans*, 6 Gray, 25.

⁶ *Nicoll v. New York & E. R. Co.*, 12 N. Y. 121, 12 Barb. 460; *Boston & A. R. Co. v. Greenbush*, 5 Lans. 461, 52 N. Y. 510; *Yates v. Van De Bogert*, 56 N. Y. 526; *ante*, Chap. VI. p. 180.

was rightfully used, and that the land is required for the purpose.¹ Where it has power to acquire property for some purposes, the vendor or person dealing with it is not presumed to know that it intended to use the property for objects not authorized by its charter, or that in the particular case the property was not required for a corporate purpose; but he may be affected with notice of the company's incapacity where it is declared by statute, or the transaction was so foreign to the purposes of the corporation as to be under no circumstances authorized by its charter.²

The question whether real estate which has been conveyed to a corporation is necessary for its purposes, and within the amount which it is authorized to hold, cannot be litigated between private parties, and can be raised only by the State; and the company, although not authorized to acquire, can convey a good title to property which has been conveyed to it.³ It can sell land not necessary to its franchise, which it has purchased, and recover the consideration.⁴ Even if prohibited by statute from holding, purchasing, and dealing in real estate, it may acquire title by taking and foreclosing a mortgage, and transmit the title.⁵ Equity, however, it has been held, will not enforce at the instance of the company the specific performance of a contract to convey to it land purchased for the purpose of speculation.⁶

The conveyances of a corporation in fraud of creditors can be questioned only on the same grounds as those of private persons.⁷

Power to use Real Estate. — The company may use incidentally for other than railroad purposes land acquired for the use of the railroad.⁸ It may allow a building to be used as a custom-house

¹ *Yates v. Van De Bogert*, 56 N. Y. 526.

² *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 443, 444; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331, 371, 372; *post*, p. 518.

³ *Walsh v. Barton*, 24 Ohio St. 28; *Ehrman v. Union Cent. Life Ins. Co.*, 35 Ohio St. 324; *Jones v. Habersham*, 3 Woods, 443, 476; *Chambers v. St. Louis*, 29 Mo. 543; *Land v. Coffin*, 50 Mo. 243; *Shewalter v. Pirner*, 55 Mo. 218; *Leazure v. Hillegas*, 7 Serg. & R. 313; *Gouldie v. Northampton Water Co.*, 7 Pa. St. 233; *Grant v. Henry Clay Coal Co.*, 80 Pa. St.

208; *Natoma Water & M. Co. v. Clarkin*, 14 Cal. 544; *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *Commonwealth v. Wilder*, 127 Mass. 1, 6; *Spear v. Crawford*, 14 Wend. 20. See *Waldo v. Chicago, St. P., & F. R. Co.*, 14 Wis. 575.

⁴ *Hendee v. Pinkerton*, 14 Allen, 381; *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93; *Page v. Heineberg*, 40 Vt. 81.

⁵ *Blunt v. Walker*, 11 Wis. 334.

⁶ *Pacific R. Co. v. Seeley*, 45 Mo. 212.

⁷ *Graham v. La Crosse & M. R. Co.*, 13 Chicago Leg. News, 135.

⁸ *Armstrong v. Penn. R. Co.*, 9 Vroom, 1; *Brown v. Winnisimmet Co.*, 11 Allen,

for the examination of the luggage of passengers.¹ It may own a coal-mine which is required to supply fuel for its engines, and sell the superfluous coal.² But the conversion of land taken under the right of eminent domain exclusively to the general purposes of trade and mechanical or manufacturing business remote from any connection with railroad uses, is a misappropriation, entitling the owner to a writ of entry to establish his right, and to recover damages for the wrongful use.³ As already seen, the company has not the same right in the use of its location as an ordinary proprietor, but the use as against adjoining proprietors is limited to what is required for the purposes of the railroad.⁴

Power to use Personal Property. — A corporation may allow its personal property to be used for temporary and incidental purposes other than those for which it was created. For convenience it will, if doing business as a common carrier, ordinarily find it expedient to own a larger supply of the means of transportation than are generally required for actual use in its ordinary business as a provision for accident or withdrawals for repairs; and it should be allowed to utilize cars and engines by putting them into the service of others when they are not needed for its own immediate use. Therefore a ferry company may own steamboats which, being purchased for the ferry, are useful for an emergency, but not required for its constant use, and when not so required let them to others, such use being temporary and incidental to the main purpose for which they are owned; and upon the same principle a railroad corporation may let to other companies its rolling-stock which may in its own business be temporarily superfluous.⁵

Power of the Company to make Contracts for Transportation beyond its Line. — The power of a railroad corporation to make contracts for transportation is not confined to such as relate strictly to its own line, but may be used to draw business to it from

326; *City Hotel v. Dickinson*, 6 Gray, 586; *Simpson v. Westminster Palace Hotel Co.*, 2 De Gex, F. & J. 141.

¹ *Warden, &c. of Dover Harbor v. South Eastern R. Co.*, 9 Hare, 489.

² *Lyde v. Eastern Bengal R. Co.*, 36 Beav. 10, 17.

³ *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1.

⁴ *Ante*, Chap. VII. p. 160; *ante*, p. 496.

⁵ *Brown v. Winnisimmet Co.*, 11 Allen, 326; *Lyndeborough Glass Co. v. Mass. Glass Co.*, 111 Mass. 315; *Forrest v. Manchester, S., & L. R. Co.*, 30 Beav. 40. See *Attorney-General v. Great Eastern R. Co.*, L. R. 11 Ch. Div. 449, L. R. 5 App. Cas. 473.

places beyond, and to promote connections with other carriers by land or water. For this purpose it sometimes contracts with connecting companies, and sometimes owns the means of transportation. Thus, it may own and run a stage-coach between one of its stations and an adjacent village for the conveyance of passengers who arrive or take passage at the station, and incur liability as a common carrier for their safety while they are conveyed in the coach.¹ It may, having purchased boats to be run on a canal connecting with its line, mortgage them and become liable for the purchase-money which was advanced by a third person at its request.² It may own and run a steamboat across navigable waters which make a part of its line, or which, lying at the end of its route, connect the road with its intended and substantial terminus.³ It may, having purchased the real and personal property of a steam transportation company whose line connected with its own, sell the property and recover the price of the purchaser.⁴ It may purchase a steamboat for the purpose of making a connection with another railroad, and bind itself by a note for the purchase-money.⁵ Two corporations, making a continuous line, may jointly own rolling-stock, to be used on both roads.⁶ An English railway company, with its western terminus on St. George's Channel, was held authorized to contract for the purchase of a steamer for transporting freight and passengers between such terminus and Dublin and Cork, the railway being regarded as a scheme for transportation not only between its termini, but as well between England and Ireland.⁷

¹ *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168, 36 Barb. 420.

² *Parish v. Wheeler*, 22 N. Y. 494. Comstock, C. J., considered the corporation bound by contracts unauthorized by its charter, at least after it had received the benefit thereof. pp. 504, 506, 508.

³ *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46. See *Illinois Cent. R. Co. v. Irvin*, 72 Ill. 452.

⁴ *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93. The decision is put on the ground that while the contract might not be authorized, the defence of want of authority was not open between the parties.

⁵ *Shawmut Bank v. Plattsburg & M. R. Co.*, 31 Vt. 491. A statute authorized contracts for transportation beyond its

termini; but as the contract in this case contemplated that the corporation was itself to become a carrier on the line by water, it seemed to be outside of the statute.

⁶ *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 40 Barb. 179. The court considered the power to exist irrespective of a statute allowing connections between railroads.

⁷ *South Wales R. Co. v. Redmond*, 10 C. B. n. s. 674. Williams, J., said: "The whole object of the act of incorporation of this company was, to connect England and Wales with the Irish coast." p. 682. Erle, C. J., distinguished the case from *Colman v. Eastern Counties R. Co.*, 10 Beav. 1, where a railway company was enjoined from guaranteeing the dividends of a steam-packet company running in

A railroad corporation has the legal capacity to contract for the transportation of goods and passengers beyond its line, and to become liable for injuries to them occurring through the default of other carriers.¹ It has also the capacity to enter into contracts or traffic arrangements with other carriers whose lines connect with its own, for facilitating transportation.²

A corporation working a railroad under a lease, when sued for its default as a common carrier, cannot set up that the lease was made without authority of law.³ Having exercised a power

connection with it. p. 685. See *Gregory v. Patchett*, 33 Beav. 595, 606, where it is said that equity will interfere to prevent a director embarking the funds of a railway company in a steamboat company; also, to the same effect, *Hare v. London & N. W. R. Co.*, 2 Johns. & H. 80, 106, 111; *Lyde v. Eastern Bengal R. Co.*, 36 Beav. 10. The following case is of doubtful authority: Two corporations, having connecting railroads, united their business, and became practically consolidated under one name and direction. They bought a steamboat, which they designed to run in connection with their united line upon a river which made their southern terminus, giving a note for the price in the name adopted by them. A suit upon the note, brought by an indorsee having knowledge of the transaction, was held not maintainable, on two grounds: 1. The union was unauthorized, and the joint contract void. 2. A railroad corporation cannot, without special authority, purchase a steamboat to run beyond its terminus. The liability of the vendor and his assigns to a suit for the price was reserved. *Pearce v. Madison & I. R. Co.*, 21 How. 441. The unauthorized union of the two corporations might have been arrested by an injunction at the instance of stockholders, but the validity of the contract of purchase, as between the parties, is a different question. The case is called "an extreme authority" in *Bissell v. Mich. S. & N. I. R. Co.*, 22 N. Y. 258, 278. But it is followed in *Hoagland v. Han. & St. J. R. Co.*, 39 Mo. 451, and *St. Joseph v. Saville*, 39 Mo. 460.

¹ *Ogdensburgh & L. C. R. Co. v. Pratt*, 22 Wall. 123; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258; *Hill Man. Co. v. Boston & L. R. Co.*, 104 Mass. 122; *Feital*

v. Middlesex R. Co., 109 Mass. 398; *Bissell v. Mich. S. & N. I. R. Co.*, 22 N. Y. 258; *Burtis v. Buffalo & S. L. R. Co.*, 24 N. Y. 269; *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168, 36 Barb. 420; *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Milnor v. New York & N. H. R. Co.*, 53 N. Y. 363; *Noyes v. Rutland & B. R. Co.*, 27 Vt. 110; *Morse v. Brainerd*, 41 Vt. 550; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339; *Perkins v. Portland, S., & P. R. Co.*, 47 Me. 573; *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Wheeler v. San Francisco & A. R. Co.*, 31 Cal. 46; *Stewart v. Erie & W. Trans. Co.*, 17 Minn. 372; *Candee v. Penn. R. Co.*, 21 Wis. 582; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; *Cincinnati, H., & D. R. Co. v. Pontius*, 19 Ohio St. 221; *Grover & B. S. M. Co. v. Mo. Pacific R. Co.*, 70 Mo. 672; *Wilby v. West Cornwall R. Co.*, 2 Hurl. & N. 703. The doctrine that a railroad corporation has no power to contract for transportation outside of its line was at first approved in Connecticut; but the courts of that State seem, from later expressions, likely to yield to the pressure of the prevailing view. *Hood v. New York & N. H. R. Co.*, 22 Conn. 1, 502; *Elmore v. Naugatuck R. Co.*, 23 Conn. 457; *Naugatuck R. Co. v. Waterbury Button Co.*, 24 Conn. 468; *Converse v. Norwich & N. Y. Trans. Co.*, 33 Conn. 166.

² *Stewart v. Erie & W. Trans. Co.*, 17 Minn. 372; *Sussex R. Co. v. Morris & E. R. Co.*, 4 C. E. Green, 13, 5 C. E. Green, 542.

³ *McCluer v. Manchester & L. R. Co.*, 13 Gray, 124; *Feital v. Middlesex R. Co.*, 109 Mass. 398; *Cole Silver M. Co. v. Va. & G. H. W. Co.*, 1 Sawyer, 470;

without question in a foreign jurisdiction, it cannot, in the State which granted the charter, set up a want of power.¹ It is liable for negligence in an act not authorized by its charter.²

A company incorporated as a common carrier, and not being authorized to engage in the business of buying and selling the commodities which it transports, is not, it has been held, liable in damages to an action for breach of a contract to purchase them.³

A railroad company may keep a warehouse and make contracts of warehousing as incidental to its business as a common carrier.⁴

Power to adopt the Acts and Contracts of Promoters.—A corporation is not bound except under statutes by the agreements made by its promoters before its organization, and is not under a legal obligation to pay for services performed before it acquired the capacity to make contracts, although proving beneficial to it.⁵ But its adoption of the contracts of the promoters will be equivalent to original action, and it will thereby succeed to the obligations as well as to the rights under the contract.⁶

Void Contracts.—The contracts of a corporation are void (1) when expressly or impliedly prohibited by statute; (2) when against public policy, (3) and, it has been maintained, when not within the powers expressly or impliedly conferred by the charter.

1. *Contracts expressly or impliedly prohibited by Statute.*—A contract is void when the statute declares it to be void in express words, or, what is equivalent, prohibits the corporation from making it. Such a declaration of the legislative will is decisive against its validity, whether the question arises in litigation be-

Doolan v. Midland R. Co., L. R. 2 App. Cas. 792.

¹ Milnor v. New York & N. H. R. Co., 53 N. Y. 363.

² Hutchinson v. Western & A. R. Co., 6 Heisk. 634; National Bank v. Graham, 100 U. S. 699; Doolan v. Midland R. Co., L. R. 2 App. Cas. 792; *ante*, Chap. X. p. 280.

³ Northwestern Union Packet Co. v. Shaw, 37 Wis. 655.

⁴ Moses v. Boston & M. R., 24 N. H.

71, 82; Smith v. Nashua & L. R. Co., 27 N. H. 86, 95.

⁵ New York & N. H. R. Co. v. Ketchum, 27 Conn. 170; Rockford, R. I., & St. L. R. Co. v. Sage, 65 Ill. 328; Coyote, G., & S. M. Co. v. Ruble, 8 Oreg. 284. But see Low v. Conn. & P. R. Co., 46 N. H. 284; Hall v. Vt. & M. R. Co., 28 Vt. 401; Bell's Gap R. Co. v. Christy, 79 Pa. St. 54.

⁶ Wood v. Whelan, 93 Ill. 153, 164, 165; Titus v. Catawissa R. Co., 5 Phil. 172.

tween the parties, or in a suit brought by stockholders to enjoin the corporation from performing it.¹

The contract is likewise void when the statute prohibits it by implication. Thus, although a corporation may without special statute authority issue bonds to pay its debts or to raise money for a corporate purpose, a statute which prescribes certain conditions on which they may be issued prohibits by implication the issue of bonds which do not comply with the conditions, and those issued without such compliance are void.² A statute impliedly prohibits a transaction on which it imposes a penalty.³ The incapacity of a corporation to form a partnership may be implied from statutes which prescribe corporate methods and duties inconsistent with such a relation.⁴ A provision in the charter, excluding the exercise of powers not necessary to the exercise of the enumerated powers, prohibits contracts for traffic upon extensions of the railroad not authorized by the charter.⁵

The charters of railroad corporations and statutes concerning them are public acts affecting all parties with notice of their prohibitions, express or implied.⁶

2. *Contracts against Public Policy, for Lobby Services, against Competition, or for a Particular Location.* — The contracts of a corporation which are against sound morals or public policy are, like similar contracts of individuals, not binding on the parties.⁷ Such

¹ Rutland & B. R. Co. v. Proctor, 29 Vt. 93, 96; Vermont & C. R. Co. v. Vt. Cent. R. Co., 34 Vt. 1, 47; Richardson v. Sibley, 11 Allen, 65; Leavitt v. Palmer, 3 N. Y. 19; Bissell v. Mich. S. & N. I. R. Co., 22 N. Y. 258, 265, 269; Crocker v. Whitney, 71 N. Y. 161; Barton v. Port Jackson & U. F. Plank Road Co., 17 Barb. 397; Taylor v. Chichester & M. R. Co., L. R. 2 Exch. 356, 379, 382; Riche v. Ashbury R. Carriage & Iron Co., L. R. 9 Exch. 224, 262, L. R. 7 H. L. 653, 673; Broughton v. Manchester & S. Water Works, 3 B. & Ald. 1.

² Commonwealth v. Smith, 10 Allen, 448; Head v. Providence Ins. Co., 2 Cranch, 127; Chambers v. Manchester & M. R. Co., 5 Best & S. 588; Rockwell v. Elkhorn Bank, 13 Wis. 653; James v. Cincinnati, H., & D. R. Co., 2 Disney, 261, 272; Kent Coast R. Co. v. London, C., & D. R. Co., L. R. 3 Ch. App. 656.

³ York & Y. R. Co., *In re*, L. R. 4 Ch. App. 748; National Permanent Benefit Building Soc., *In re*, L. R. 5 Ch. App. 309.

⁴ Whittenton Mills v. Upton, 10 Gray, 582. See Pearce v. Madison & I. R. Co., 21 How. 441; Bissell v. Mich. S. & N. I. R. Co., 22 N. Y. 258; Charlton v. Newcastle & C. R. Co., 5 Jurist, n. s. 1096; Hare v. London & N. W. R. Co., 2 Johns. & H. 80.

⁵ Morris & E. R. Co. v. Sussex R. Co., 5 C. E. Green, 542, 4 C. E. Green, 13, 574.

⁶ Whittenton Mills v. Upton, 10 Gray, 582, 598; Richardson v. Sibley, 11 Allen, 65, 72; Pearce v. Madison & I. R. Co., 21 How. 441, 443; Franklin Co. v. Lewiston Savings Bank, 68 Me. 43; East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775, 811; MacGregor v. Dover & D. R. Co., 18 Q. B. 618, 630.

⁷ Bissell v. Mich. S. & N. I. R. Co.,

are contracts for "lobby services," or the use of personal influence with legislators in order to secure their votes for bills;¹ or contracts which have a direct tendency to prevent a healthy competition,² or unreasonably discriminate between different owners of merchandise in charges for transportation;³ and other contracts, supposed to conflict with public interests, as for a particular location for a station,⁴ especially if excluding any other location;⁵ or for the withdrawal of opposition, based on public grounds, to proposed legislation concerning the railroad;⁶ or the payment of interest on the capital stock.⁷

22 N. Y. 258, 269, 285. See a criticism upon the terms "public policy," as elastic and unintelligible, in *Midland R. Co. v. Great Western R. Co.*, L. R. 8 Ch. App. 841, 851, 854.

¹ *Marshall v. Balt. & O. R. Co.*, 16 How. 314; *Trist v. Child*, 21 Wall. 441.

² *Sanford v. Catawissa, W., & E. R. Co.*, 24 Pa. St. 378; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.*, 3 Rob. (N. Y.) 411; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188; *Messenger v. Penn. R. Co.*, 8 Vroom, 531, 7 Vroom, 407; *Stewart v. Lehigh Valley R. Co.*, 9 Vroom, 505; *Sussex R. Co. v. Morris & E. R. Co.*, 5 C. E. Green, 542, 4 C. E. Green, 13; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365; *Stewart v. Erie & W. T. Co.*, 17 Minn. 372. See *Sargent v. Boston & L. R. Co.*, 115 Mass. 416. But in *Hare v. London & N. W. R. Co.*, 2 Johns. & H. 80, 103, Vice-Chancellor Wood said: "It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard."

³ *Ante*, p. 498.

⁴ *Fuller v. Dame*, 18 Pick. 472; *Pacific R. Co. v. Seely*, 45 Mo. 212; *Workman v. Campbell*, 46 Mo. 305; *Bestor v. Wathen*, 60 Ill. 138; *Linder v. Carpenter*, 62 Ill. 309; *Marsh v. Fairburg, P., & N. W. R. Co.*, 64 Ill. 414; *St. Louis, J., & C. R. Co. v. Mathers*, 71 Ill. 592; *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602; *Holladay v. Patterson*, 5 Oreg. 177. *Contra*, *Cedar Rapids & St. P. R. Co. v. Spafford*, 41 Iowa, 292; *First National Bank v. Hendrie*, 49 Iowa, 402; *Berryman v. Cincinnati Southern*

R. Co., 14 Bush, 755. See *Wilson v. Northampton & B. J. R. Co.*, L. R. 9 Ch. App. 279; *Watterson v. Allegheny Valley R. Co.*, 74 Pa. St. 208; *Taylor v. Cedar Rapids & St. P. R. Co.*, 25 Iowa, 371; *Gallagher v. Fayette County R. Co.*, 38 Pa. St. 102; *Pusey v. Wright*, 31 Pa. St. 387; *McClure v. Mo. River, Ft. S., & G. R. Co.*, 9 Kan. 373. A contract to pay money to a corporation on the completion of its road to a particular place is valid. *Ante*, Chap. III. p. 60.

⁵ *Williamson v. Chicago, R. I., & P. R. Co.*, 22 A. L. J. 29, 37 *Chicago Leg. News*, 373.

⁶ *Pingry v. Washburn*, 1 Aiken, 264. Such a contract has been held valid when the opposition rests on private grounds, and when the contract is made with no design to conceal the fact of compensation. *Low v. Conn. & P. R. R. Co.*, 46 N. H. 284. Agreements to withdraw opposition to parliamentary bills have been sustained in England. *Simpson v. Lord Howden*, 9 Clark & F. 61, 10 A. & E. 793; *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, 2 Mac. & G. 324, 17 Q. B. n. s. 652, 668; *Edwards v. Grand Junction R. Co.*, 1 My. & Cr. 650; *Stanley v. Chester & B. R. Co.*, 3 My. & Cr. 773; *Webb v. Direct London & P. R. Co.*, 1 De G., M. & G. 521; *Preston v. Liverpool, M., & N. J. R. Co.*, 5 H. L. Cas. 605, 17 Beav. 114; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331, 374, 1 De Gex, M. & G. 737; *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 373, 376; *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 421. See *Earl of Shrewsbury v. North Staffordshire R. Co.*, L. R. 1 Eq. Cas. 593.

⁷ *Ante*, Chap. V. p. 126.

For Applications to the Legislature.—Whether a corporation may enter into an agreement for making an application to Parliament for amendments of its charter and for new powers has been the subject of much contention in England. The question has arisen chiefly on bills in equity by shareholders to enjoin the company from making the application and paying the expenses from corporate funds; and the transaction has been treated as *ultra vires* or not, accordingly as it was construed to be carrying out the original scheme, or as embarking the company in a new and different one. The discussion implies a theory of the relation of the judicial to the legislative power, which is not accepted in the United States; and the admission of this extraordinary power in the courts to control petitions to the supreme legislature has not escaped criticism even in England.¹

In this country the judicial power does not undertake to define in advance what the legislature may properly do by way of amendment or change in the charter, or enjoin a corporation or person from making a petition to the legislature for any purpose whatever;² and the liability of a corporation to pay the legitimate expenses of an application made on its behalf, such as counsel and witness fees, cannot well be denied.³ The corporation may also make contracts with reference to extensions and changes in its location depending on future legislation.⁴

For the Transfer of Franchises and Railroad.—Corporations having by reason of their objects, or the extraordinary powers conferred upon them, certain public obligations, are not permitted to enter into contracts which disable them from performing their public functions. Thus, a railroad corporation cannot, as already seen, without legislative authority transfer by

¹ The English cases, on application to Parliament, are reviewed in Green's *Brice's Ultra Vires*, Part II. ch. viii. *Stockton & H. R. Co. v. Leeds & T. R. Co.*, 2 Phill. 666; *Heathcote v. North Staffordshire R. Co.*, 2 Mac. & G. 100; *Maunsell v. Midland R. Co.*, 1 Hem. & M. 130; *Bateman v. Ashton-under-Lyne*, 3 Hurl. & N. 323; *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775.

² *People v. Canal Board*, 55 N. Y. 390; *Story v. Jersey City & B. P. Plank Road Co.*, 1 C. E. Green, 13.

³ Municipal corporations, however,

cannot use their limited power of taxation for such a purpose. *Minot v. West Roxbury*, 112 Mass. 1; *Coolidge v. Brookline*, 114 Mass. 592.

⁴ *Morris & E. R. Co. v. Sussèx R. Co.*, 5 C. E. Green, 542, 4 C. E. Green, 13; *New Haven & N. Co. v. Hayden*, 107 Mass. 525; *Supervisors v. Wis. Cent. R. Co.*, 121 Mass. 460; *Norwich v. Norfolk R. Co.*, 4 El. & B. 397; *Scottish North Eastern R. Co. v. Stewart*, 3 Macq. 382; *Taylor v. Chichester & M. R. Co.*, L. R. 4 H. L. 628, L. R. 2 Exch. 356.

deed, mortgage, lease, or other agreement, its railroad and franchises, or assume the ownership or management of some other like enterprise.¹ Such a transfer may have the effect to substitute a scheme differing from that for which authority was obtained, to put the management into the hands of persons other than those intended, and to combine enterprises which the legislature presumably thought it prudent to keep separate. Such agreements are generally held void as against public policy, and involving a breach of public duty. They are also treated as *ultra vires*; but they should not be confounded under that term with ordinary business transactions, which may not be necessary or incidental to the express powers of a corporation.

3. *Contracts not within the Powers expressly or impliedly conferred by the Charter. Ultra Vires.*—Such powers only are implied as are necessary and incidental to the express powers, and are within the scope and purpose of the charter. In some cases the departure is so gross, affecting all persons with knowledge of its unlawful character, and reasons of public policy being also operative against it, that there is little difficulty in refusing validity to the contract. Thus, contracts by which a railroad corporation engages in the business of banking are clearly unauthorized by the corporate scheme, as well as violate a distinct rule of public policy.²

The most vexed question in the law of corporations is to determine the legal effect of contracts made by them, which, though not prohibited by any special provisions of statutes, or any rule of public policy which binds individuals as well as corporations, involve an abuse of the power to contract merely because they

¹ See cases cited *ante*, p. 496, note 13. In *Thomas v. West Jersey R. Co.*, 101 U. S. 71, the corporation undertook to lease its railroad without legislative authority, and the transaction was held, in accordance with the current of authorities, to be a violation of its contract with the State, and void as against public policy. The opinion of Miller, J., goes further, and appears to sustain fully the principles of the two English cases: *The East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775, and *The Ashbury R. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; and claims that the latter

decision "represents the decided preponderance of authority, both in this country and in England."

² *Clark v. Farrington*, 11 Wis. 306, 324; *Waldo v. Chicago, St. P., & F. R. Co.*, 14 Wis. 575; *Vandall v. South S. F. Dock Co.*, 40 Cal. 83, 88; *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389. A reference in an act to a contract which was in excess of power does not necessarily recognize it as valid. *Kent Coast R. Co. v. London, C., & D. R. Co.*, L. R. 3 Ch. App. 656; *Galloway v. London, L. R. 1 H. L. 34*; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *ante*, p. 507.

are found on judicial inquiry not to be necessary or incidental to the express powers conferred on the corporation. Not coming within its scope and purpose, and designated as contracts *ultra vires*, they have been the subject of extended discussion by authors and judges.¹

Meaning of the Term Ultra Vires.—The term *ultra vires* is used in different senses, as to designate (1.) Acts which were beyond the powers of the directors, though not beyond the powers of the corporation; (2.) Acts which are forbidden by law or public policy, and are more properly called “illegal;” (3.) Acts which are not within the express or implied powers of the corporation, but not otherwise illegal. The use of the term in any other than this last sense only leads to confusion.²

Defence of Ultra Vires when not allowed. Estoppel.—The defence of *ultra vires*, although admitted as a theory, yields readily to considerations of equity and fair dealing; and a party who wrongfully seeks to take advantage of it is held to be estopped from setting it up as a defence. This statement finds support in certain results which have been reached by the authorities, and may properly be given in this connection.

The Defence not admitted where the Contract has been executed by one Party.—The defence of *ultra vires* is not admitted in the case of executed contracts not involving moral turpitude. If the contract is simply not authorized by statute, or is even pro-

¹ In view of the confusion of authorities on this subject, it was wisely said by Lord Westbury, in *Taylor v. Chichester & M. R. Co.*, L. R. 4 H. L. 628, 646: “A great deal of difficulty arises in these cases from wandering away from the case we have to determine into a thousand and one other cases which have been decided.”

² *Bissell v. Mich. S. & N. I. R. Co.*, 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 68, 69; *Miner's Ditch Co. v. Zellerbach*, 37 Cal. 543, 579; *McPherson v. Foster*, 43 Iowa, 48, 64, 65; *Earl of Shrewsbury v. North Staffordshire R. Co.*, L. R. 1 Eq. Cas. 593, 618, 35 L. J. Ch. 166; *Ashbury R. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, 672; *Green's Brice's Ultra Vires*, Part II. ch. i. § 2; *National*

Pemberton Bank v. Porter, 125 Mass. 333, 335. “There is nothing of mystery or of sanctity in the use of the words of a dead language, *ultra vires*; and although it is a concise and convenient form by which to indicate the unauthorized action of artificial persons with limited powers, still it is as applicable to individual as to corporate action. An illegal act of an individual is as really *ultra vires* as the unauthorized act of a corporation.” For articles in magazines on the doctrine of *ultra vires*, see 5 Am. Law Rev. 272, 11 Cent. L. J. 81, 101. An elaborate note in 2 Kent Com. *300 (12th ed.), by Mr. Holmes, seems to adopt the doctrine as held in *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775.

hibited by statute, even though no action could be maintained for a breach while the contract remains executory, an action can be maintained to recover money paid, or the price or consideration of property received under it. The doctrine of estoppel is applied to the defence of want of legal capacity when set up by a party who has received the benefit of the contract, both where the plaintiff alleges such incapacity in himself or in the defendant.¹ A corporation cannot recover property which it has parted with under a contract *ultra vires*, without returning the consideration which it received.²

Where a corporation has exercised powers germane and incidental to those conferred, and in furtherance of its general objects, although the subject may not be within any definite power given, it will be estopped from denying that it had authority to make such contract. Good faith to third parties who deal with it, and who may have no accurate knowledge of the extent of its powers under its charter, demands the adoption of this salutary rule.³

¹ Tracy v. Talmage, 14 N. Y. 162; Bissell v. Mich. S. & N. I. R. Co., 22 N. Y. 258, 273; Parish v. Wheeler, 22 N. Y. 494; Whitney Arms Co. v. Barlow, 63 N. Y. 62; DeGross v. American Linen Thread Co., 21 N. Y. 124; Kent v. Quicksilver Mining Co., 78 N. Y. 159, 189; Steam Navigation Co. v. Weed, 17 Barb. 378; Caldwell v. National Mohawk Valley Bank, 64 Barb. 333, 352; Franklin Co. v. Lewiston Savings Bank, 68 Me. 43, 49; Rutland & B. R. Co. v. Proctor, 29 Vt. 93; Dill v. Wareham, 7 Met. 438; Morville v. American Tract Soc., 123 Mass. 129; National Pemberton Bank v. Porter, 125 Mass. 333; Attleborough National Bank v. Rogers, 125 Mass. 339; Ossipee Hosiery & W. Man. Co. v. Canney, 54 N. H. 295, 325; Dimpfel v. Ohio & M. R. Co. (U. S. C. C., S. D. Ill.), 8 Reporter, 641; Oil Creek & A. R. R. Co. v. Penn. Trans. Co., 83 Pa. St. 160; Hays v. Galion Gas Light & C. Co., 29 Ohio St. 330, 340; State Board of Agriculture v. Citizens St. R. Co., 47 Ind. 407; Bradley v. Ballard, 55 Ill. 413; Chicago Building Soc. v. Crowell, 65 Ill. 453; Darst v. Gale, 83 Ill. 136; German Nat. Bank v. Meadowcroft, 95 Ill. 124; Hazlehurst v. Savannah, G., & N. A. R. Co., 43 Ga. 13, 54, 55; Argenti v. San Francisco, 16 Cal. 255; Herzo v. San

Francisco, 33 Cal. 134; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543; North Western Union Packet Co. v. Shaw, 37 Wis. 655; Paul v. Kenosha, 22 Wis. 266; Wapello v. B. & M. R. Co., 44 Iowa, 585; Thompson v. Lambert, 44 Iowa, 239; Thomas v. Richmond, 12 Wall. 349; Hitchcock v. Galveston, 96 U. S. 341, 351; Gold-Mining Co. v. National Bank, 96 U. S. 640; National Bank v. Matthews, 98 U. S. 621; Central Branch Union Pacific R. Co. v. Western Union Tel. Co. (U. S. C. C., D. Kan.), 10 Reporter, 417; Daniels v. Tearney, 11 Reporter, 113. See Montgomery v. Montgomery & W. Plank Road Co., 31 Ala. 76. A statute of California which provides that "no contract shall be binding on the company unless made in writing," is held to apply only to contracts wholly executory. Foulke v. San Diego & G. S. P. R. Co., 51 Cal. 365.

² Atlantic & P. Tel. Co. v. Union Pacific R. Co. (U. S. C. C., D. Neb.), 1 Fed. Rep. 745. See Central Branch Union Pacific R. Co. v. Western Union Tel. Co. (U. S. C. C., D. Kan.), 10 Reporter, 417.

³ The proposition stated in the text is the same as given in West v. Madison County Agricultural Board, 82 Ill. 205, 207; Chicago Building Soc. v. Crowell, 65 Ill. 453, 460.

Not admitted when a General Power is used for an Unauthorized Purpose.—The defence of *ultra vires* is not available to a corporation where, in dealing with a person who is not informed of the abuse, it uses for an unauthorized purpose a general power which has been conferred upon it. Thus, an innocent vendor who sells the corporation property capable of use for the purposes of the railroad will not be affected by the secret purpose of the directors to use it in speculation. Having the power to bind itself by commercial paper as evidence of its indebtedness, it cannot set up as a defence to such paper in the hands of a *bona fide* holder that it was given as accommodation paper.¹ If the power to make the contract exists, an excess in some particulars is not a defence.²

Further, it may be remarked that, where there is no statute prohibition, the citizen should not be required, in dealing with a corporation, to concern himself with nice questions as to what transactions are necessary, incidental, or auxiliary to its express powers, or to act at his peril where his only light is the extended opinions of jurists, often conflicting in the same case, varying in different tribunals, and incapable of being reduced to a consistent body of doctrine.

Not admitted where the Stockholders have assented, unless the Transaction involves a Public Wrong.—An act of the corporation which is *ultra vires*, but not *malum in se* or expressly prohibited by statute, may become valid by the assent of stockholders. This principle is applied only where the act does not involve a public wrong, and is *ultra vires* merely as between the stockholders, and affects only their interests. Their acquiescence, as well as express assent, works an equitable estoppel upon them. Thus, if they actively participate in the proceedings, or fail to resort in

¹ Monument National Bank v. Globe Works, 101 Mass. 57; Ossipee Hosiery & W. Man. Co. v. Canney, 54 N. H. 295, 325; Bissell v. Mich. S. & N. I. R. Co., 22 N. Y. 258, 273, 289, 290; Mechanics' Banking Assoc. v. New York & S. W. L. Co., 35 N. Y. 505; Noyes v. Rutland & B. R. Co., 27 Vt. 110, 112; Madison & I. R. Co. v. Norwich Savings Soc., 24 Ind. 457; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 578, 579, 583-588; McPherson v. Foster, 43 Iowa, 48, 65; Jones v. Cincin-

nati, H., & D. R. Co., 2 Disney, 261, 272; Norwich v. Norfolk R. Co., 4 El. & Bl. 397, 443; Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 331, 350, 371, 5 Am. Law Rev. 272, 282. See Strauss v. Eagle Ins. Co., 5 Ohio St. 59, 66; Central R. Co. v. Collins, 40 Ga. 582; ante, p. 507.

² Germantown Farmers' Mut. Ins. Co. v. Dhein, 43 Wis. 420; Pittsburg & C. R. Co. v. Allegheny County, 63 Pa. St. 126, 127. See Bank of Middlebury v. Rutland & W. R. Co., 30 Vt. 159, 170.

due season to equitable remedies, they are estopped from setting up that a transaction involved the use of corporate funds for a purpose not authorized by the charter,¹ or that the corporation could not lawfully issue preferred stock.²

Not admitted where it effects a Legal Wrong.—“The plea of *ultra vires*,” it has been said by high authority, “should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong.”³ A doctrine, it may be remarked, which is to be set aside whenever in a pending cause it does not appear to the court to stand this test, cannot be treated as a rule of civil conduct.

It will be found, on an examination of the American authorities, that while the capacity of a commercial and business corporation to make contracts is, as a definition, limited to legitimate corporate purposes, the defence of *ultra vires*, in the absence of a statute prohibition or a rule of public policy applying to individuals as well as corporations, is not allowed to avail between the parties; and the corporation is to be kept within its sphere by the intervention of the State, or by a bill in equity filed by stockholders.⁴ The doctrine of estoppel has in most cases, as has been seen, been found sufficient to meet the defence.⁵

While stockholders have the remedy by injunction for the protection of their interests,⁶ and the State can, by proceedings for the forfeiture of the charter and by penal legislation, keep the corporation within its lawful sphere, it is not expedient to encourage indifference to obligations by allowing the defence of *ultra vires*. The individual is not permitted to escape by this plea from his contracts, except when they are prohibited by statute or public policy, and the tendency of jurisprudence is to treat the corporation as a complete personality.

¹ *Zabriskie v. Cleveland, C., & C. R. Co.*, 23 How. 381; *Cozart v. Georgia R. & B. Co.*, 54 Ga. 379, 384; *Riche v. Ashbury R. Carriage & Iron Co.*, L. R. 9 Exch. 224, 231, 232 (but see s. c. L. R. 7 H. L. 653, 672). See *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43.

² *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 12 Hun. 53; *Hazlehurst v. Savannah, G., & N. A. R. Co.*, 43 Ga. 13, 56.

³ *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 69; *Darst v. Gale*, 83 Ill. 136, 140; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 267.

⁴ *Ante*, pp. 516–518.

⁵ *Ante*, pp. 516–518; *post*, p. 520; *Perkins v. Portland, S., & P. R. Co.*, 47 Me. 573, 591.

⁶ In *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 380, *Blackburn, J.*; *post*, p. 522, *note*.

A corporation cannot set up irregularities in its organization as a defence to its contract. These cannot be taken advantage of collaterally.¹

The defence of *ultra vires* is not admitted in the case of torts committed by a corporation in transactions beyond its powers.²

Remedy of Stockholders.—Equity will enjoin a corporation and its officers, at the suit of a stockholder, from entering into contracts or engaging in transactions which are in violation of the charter, and involve a breach of trust on the part of the corporation and its officers.³ The right to the remedy may be lost by assent, acquiescence, and unreasonable delay.⁴ A single stockholder may file the bill;⁵ but, according to the approved form of pleading, it should be filed in behalf also of other stockholders who may choose to become parties.⁶ The motive of the stockholder in bringing the suit is immaterial;⁷ but equity will not interfere on behalf of others who are not shareholders, or of a “puppet” or “man of straw,” who is acting as the mere instrument of a rival company.⁸

A court of equity will not, at the suit of the Attorney-General, restrain a railroad corporation from making contracts and doing

¹ *Zabriskie v. Cleveland, C., & C. R. Co.*, 23 How. 381; *Conn. Mut. Life Ins. Co. v. Cleveland, C., & C. R. Co.*, 41 Barb. 9; *Callender v. Painesville & H. R. Co.*, 11 Ohio St. 516; *Sturges v. Knapp*, 31 Vt. 1, 62, 63; *Bargate v. Shortridge*, 5 H. L. Cas. 297; *ante*, Chap. I. p. 7.

² *National Bank v. Graham*, 100 U. S. 699.

³ See cases cited *ante*, Chap. II. p. 43; *Hodges v. New England Screw Co.*, 1 R. I. 312, 3 R. I. 9; *Pratt v. Pratt*, 33 Conn. 446; *Bissell v. Mich. S. & N. I. R. Co.*, 22 N. Y. 258, 275; *Central R. Co. v. Collins*, 40 Ga. 582; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Platteville v. Galena & S. W. R. Co.*, 43 Wis. 493; *Wiswall v. Greenville & R. Plank Road Co.*, 3 Jones Eq. 183.

⁴ *Peabody v. Flint*, 6 Allen, 52; *Gifford v. New Jersey R. & T. Co.*, 2 Stock. 171; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 423, 9 C. E. Green, 455; *Chapman v. Mad River & L. E. R. Co.*, 6 Ohio St. 119; *Cozart v. Georgia R. & B. Co.*, 54 Ga. 379; *Mowrey v. Indianapolis*

& C. R. Co., 4 Biss. 78; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220.

⁵ *Charlton v. Newcastle & C. R. Co.*, 5 Jurist, n. s. 1096.

⁶ *Zabriskie v. Cleveland, C., & C. R. Co.*, 23 How. 381, 395; *March v. Eastern R. Co.*, 40 N. H. 548, 568; *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130, 9 C. E. Green, 455; *Beman v. Rufford*, 1 Simons, n. s. 550; *Winch v. Birkenhead, L., & C. J. R. Co.*, 5 De Gex & S. 562.

⁷ *Ramsey v. Gould*, 57 Barb. 398; *Ramsey v. Erie R. Co.*, 8 Abbott Prac. n. s. 174; *Central R. Co. v. Collins*, 40 Ga. 582; *Attorney-General v. Great Northern R. Co.*, 1 Drewry & S. 154, 159. See *Occum Co. v. Sprague Man. Co.*, 34 Conn. 529.

⁸ *Filder v. London, B., & S. C. R. Co.*, 1 Hem. & M. 489; *Forrest v. Manchester, S., & L. R. Co.*, 4 De Gex, F. & J. 126; *Ffooks v. South Western R. Co.*, 1 Sm. & G. 142; *Hare v. London & N. W. R. Co.*, 2 Johns. & H. 80, 119; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. 157, 3 Abbott U. S. 163.

business in excess of its powers where no case of public injury appears.¹

Acts of Directors and Agents when capable of Ratification. — The corporation may ratify the unauthorized acts of its directors and agents which it has the power to authorize; but it cannot by ratification give validity to acts which it could not lawfully do.² The ratification may be express or implied from the acceptance of the benefit of the transaction.³ A lease which the corporation has no power to make does not become valid by the acceptance of the rent payable by its terms.⁴ But the consent of all parties interested has been held to give validity to the unauthorized sale of a railroad.⁵ The directors may by a ratification give validity to the unauthorized acts of an agent which they had the power to authorize.⁶

The Doctrine of Ultra Vires in England. — For the years 1846–1880 no question vexed English jurists so much as the power of corporations, particularly railway corporations, to make contracts. This period, which may be said to have added a new term to the nomenclature of the law, — *ultra vires*,⁷ — is marked by a discordance of opinion between different tribunals and between the judges of the same tribunal. Thus, in a late case the contract was held valid by all the barons in the Court of Exchequer;⁸ their judgment was reversed in the Exchequer Chamber, four judges voting for and two against the reversal, and four opinions being delivered, two judges on one side taking views of the authorities and of the principles governing the capacity of corporations to make con-

¹ *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; *United States v. Union Pacific R. Co.*, 98 U. S. 569. See *Attorney-General v. Great Northern R. Co.*, 1 Drewry & S. 154; *Attorney-General v. Great Eastern R. Co.*, L. R. 5 App. Cas. 473, L. R. 11 Ch. Div. 449; *Attorney-General v. Railroad Cos.*, 35 Wis. 425; *ante*, Chap. II. p. 44.

² *McLaughlin v. Detroit & M. R. Co.*, 8 Mich. 100; *Peterson v. New York*, 17 N. Y. 449, 454; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230, 236; *Ashbury R. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, 673; *Choteau v. Allen*, 70 Mo. 290; *Deaderick v. Wilson*, 8 Baxter, 108. But see *ante*, p. 518, as to effect given to the assent and acquiescence of stockhold-

ers where the unauthorized act is not *malum in se* or expressly prohibited by statute.

³ *Curtis v. Leavitt*, 15 N. Y. 9, 47; *Miller v. Rutland & W. R. Co.*, 36 Vt. 452, 475.

⁴ *Ogdensburg & L. C. R. Co. v. Vt. & C. R. Co.*, 6 Thomp. & C. 488.

⁵ *Miss. & M. R. Co. v. Howard*, 7 Wall. 392, 415.

⁶ *Darst v. Gale*, 83 Ill. 136; *Wood v. Whelan*, 93 Ill. 153; *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *Brown v. Winnisimmet Co.*, 11 Allen, 326, 335.

⁷ See preface of first edition of Brice's *Ultra Vires*.

⁸ *Taylor v. Chichester & M. R. Co.*, 4 Hurl. & C. 409 (1866).

tracts the opposite of those declared by the other two.¹ Still later, the House of Lords reversed the judgment of the Exchequer Chamber, and sustained that of the Court of Exchequer.²

¹ L. R. 2 Exch. 356 (1867); *post*, p. 536.

² L. R. 4 H. L. 628 (1870). The history of the still later case of *Riche v. Ashbury R. Carriage & Iron Co.* is quite similar to that of the Taylor case, L. R. 9 Exch. 224 (1874), L. R. 7 H. L. 653 (1875); *post*, p. 537. Blackburn, J., who has clear perceptions on the subject, said, in *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 378: "As the shareholders are in substance parties in a trading concern, the management of which is committed to the body corporate, a trust is by implication created in favor of the shareholders that the corporation will manage the corporate affairs, and apply the corporate funds for the purpose of carrying out the original speculation. The rights thus conferred on the shareholders, as between them and the corporation, are very analogous to those between partner *inter sese*, and like those depend upon the terms on which the parties entered on the joint speculation. Any shareholder has a right to object to any act being done which is in contravention of the rights thus given to him. Though the majority of the shareholders, or even all but himself, approve, yet he has a right to object to the making or the enforcing of any contract to do any unauthorized act which would affect his individual interest. But the shareholder may waive any right which is given to him for his own protection only; and if he has either expressly or tacitly done so, he can no longer object; and neither a stranger nor the body corporate itself can raise such an objection to a contract made by the corporation, if no shareholders choose to raise it for themselves. But the legislature, with a view to public policy, does, sometimes expressly, sometimes by implication, prohibit the doing of certain acts by companies thus incorporated; and when an act is thus made *malum prohibitum*, any contract to do it is illegal; and if there is an attempt made to enforce such a contract, the defendant, whether a company or individual, may, if his conscience permit him, set up the illegality to which he was a party; for *in*

pari delicto potior est conditio defendentis.

Though every shareholder in the company had assented to the making of a particular contract, yet if the legislature have, not merely for the protection of the shareholders, but for the good of the public, forbidden the making of it, it is illegal, and the corporation whose shareholders have all assented is in no worse position for raising the defence than the chairman of the company who has personally entered into the contract, and yet may, as was decided in *Macgregor v. Dover & Deal Railway Company* (18 Q. B. 618), set up the provisions of the railway acts as making his personal contract illegal. The question, whether a particular thing is thus prohibited by the statutes, must in every case depend upon the true construction of them. I think it very unfortunate that the same phrase of '*ultra vires*' has been used to express both an excess of authority as against the shareholders, and the doing of an act illegal as being *malum prohibitum*; for the two things are substantially different; and I think the use of the same phrase for both has produced confusion. . . . I think that any objection made only on the ground that it affects the interest of a shareholder can only be made by and on behalf of the shareholders, and therefore cannot be made in a court of law at all, but must, if raised at all, be raised in a court of equity." But, on the other hand, Montagu Smith, J., said for himself, Keating and Lush, JJ., p. 370: "We think that if a contract, made by a company incorporated by act of Parliament for defined and limited objects, discloses on the face of it a covenant which, if enforced, would cause the funds of the company to be appropriated to purposes other than those to which the act says they shall 'only' be applied, such an agreement cannot be made the foundation of an action. In the case of railway companies it is necessary, not only for the interest of shareholders, but of the public, that this should be so. The public are undoubtedly interested in the maintenance of a railway authorized

The doctrine of *ultra vires*, as applied to the contracts of corporations, is well illustrated by two cases which were the starting-points of the discussion, one in equity, and the other at law. In *Colman v. Eastern Counties Railway*,¹ the first case in which it was applied, an injunction was granted on a bill brought by a shareholder to restrain a railway company from guaranteeing the dividends of a connecting steam-packet company, on the ground that "the powers which are given by an act of Parliament, like that now in question, extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned;" and that the corporation cannot, with a view to ex-

by Parliament. Land-owners and other persons have probably sustained much individual loss and inconvenience for that which is assumed to be a public good; and all the Queen's subjects have an interest that the funds of the company should not be improperly diverted from the purposes to which Parliament has declared they shall be applied. This view of the law was presented in explicit terms by Jervis, C. J., in *East Anglian Railway Company v. Eastern Counties Railway Company* (11 C. B. p. 811), already referred to. It would be of little use for the legislature to define the limits of action of companies and the application of their funds, if a different rule were to prevail; and it seems reasonable to hold that, when Parliament does define the objects of a company and the appropriation of its funds, it, by implication, prohibits other objects and a different appropriation."

The policy and morality of the doctrine of *ultra vires* as a defence upon contracts have been often questioned by English judges and writers. It has been called an "indecent" defence. *Hawkes v. Eastern Counties R. Co.*, 1 De Gex, M. & G. 737, 760, Lord St. Leonards. His Lordship said in the House of Lords in the same case: "The safety of men in their daily contracts requires that this doctrine of *ultra vires* should be confined within narrow bounds," and expressed the hope that there would be no other cases "where the defence of a company rests upon a want of power to make a contract which the directors deliberately entered

into, and under which they took a benefit, or upon the irregularities of their own proceeding." 5 H. L. Cas. 331, 371, 382. In *Bateman v. Ashton-under-Lyne*, 3 Hurl. & N. 323, 337, Martin, B., concurred with these views of Lord St. Leonards; and like concurrence was expressed by Sir John Romilly, Master of the Rolls, in *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, 16 Beav. 441, 451. In *South Yorkshire R. & River Dun Co. v. Great Northern R. Co.*, 9 Exch. 55, 89, Parke, B., assumed the defence to be a dishonest one, and (as Lord Wensleydale) in *Scottish North-Eastern R. Co. v. Stewart*, 3 Macq. 382, 415, while regarding the doctrine as sound law, said that "the application of it to the points of each particular case had not always been satisfactory to his mind." In *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 416, Erle, J., thought the doctrine one which "brings with it serious evil, both in affecting with uncertainty contracts with railway companies, and also in reversing the usual application of the law of contract, in as far as it justifies instead of redressing breaches of contract." Mr. Brice, in the preface to his treatise on *Ultra Vires*, treats the doctrine in no friendly spirit, referring to it as "a misleading principle," and saying that "as a necessary result the decisions and *dicta* upon this subject are very conflicting, and some absolutely irreconcilable, while the principle itself is become, if not an excrescence upon, at least a very disturbing element in, the legal system."

¹ 10 Beav. 1 (1846).

pected profits, enter on other and different trades and transactions not pointed out by its act, as the one proposed was held to be, even with the assent of all the shareholders. The Master of the Rolls, Lord Langdale, laid stress on the importance, for the sake of the shareholders, of restraining the company from hazardous speculations, and, for the sake of the public, of making such investments secure, referring to "the frenzy" which had for the previous fifteen years prevailed in relation to such enterprises. This reference to a period of extraordinary speculation in railway schemes shows the inspiration under which many of the early opinions on the doctrine of *ultra vires* were given.¹ In the case of the East Anglian Railways Company v. Eastern Counties Railway Company,² which introduced the discussion into the courts of law, an agreement by one company to take a lease of the railway of another, to provide capital for other railway works, and to pay the expenses of bills pending in Parliament which would give authority for such additional works, was, in an action to recover the expenses, held to be illegal and void. The principle of the decision was that the corporation had only a limited authority for the purpose of making and maintaining the railway sanctioned by the act, and the contract relating to the parliamentary bills was not within its scope and was therefore void.³

¹ Lord Langdale admitted in the case that railway corporations had been "so recently introduced into the country that neither the legislature nor courts of justice have been yet able to understand all the different lights in which their transactions ought properly to be viewed."

² 11 C. B. 775 (1851).

³ Jervis, C. J., pp. 811-814: "It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their act; but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profits of their own railway. This, in truth, is the same proposition in another form; for, if the company cannot carry on a new trade merely because it

was not contemplated by the act, they cannot embark in other undertakings not sanctioned by their act, merely because they hope the speculation may ultimately increase the profit of the shareholders. . . . Every proprietor, when he takes shares, has a right to expect that the conditions, upon which the act was obtained, will be performed; and it is no sufficient answer to a shareholder, expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be necessary, and destined by Parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was obtained, and not expressly sanctioned by the legislature. The cases in equity which have been cited proceeded upon this view of the

The case in equity being a suit of a stockholder, not an action between the corporation and a third party, is in conformity to the sound doctrine which entitles a shareholder to arrest in equity a diversion of the corporate funds, while the case at law may be sustained on the ground that the contract in question, which proposed a practical union of different corporations and enterprises not yet authorized by the legislature, was against public policy.

Generally, it may be said that, although the English cases on this subject contain suggestive discussions, they are, for certain reasons, peculiar to the English system of railway law and administration, of less authority in this country than English cases in other branches of the law.¹ The methods of treating corporations in the two countries differ so much in essential particulars as to require careful discrimination in applying the decisions made in one to questions arising in the other. A critical treatment of the English cases, with a view to define the powers of corporations in the United States, requires attention to the following points:—

1. The English system of railway law differs from our own in the minute details of statutes containing much that is left to the common law in this country, and declaring a public policy which even governs decisions in matters not within the statutes.²

2. In the United States, the doctrine that the contracts of corporations must be attested by the common seal has yielded to modern convenience, and the contracts of such bodies require no further solemnities than those of individuals.³ This is only par-

subject, and were decided, not because the particular act restrained by injunction was a breach of trust, but because it was not within the scope of the directors' authority, was not justified by the statute, and was therefore illegal. . . . We know that each of the four litigant companies has a separate act of Parliament; we know that the statute incorporating the defendants' company gives no authority respecting the bills promoted by the plaintiffs: and we are therefore bound to say that any contract relating to such bills is not justified by the act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void."

¹ For comments upon the English cases, see *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Bissell v. Mich. S. & N.*

I. R. Co., 22 N. Y. 258; *Cary v. Cleveland & T. R. Co.*, 29 Barb. 35; *Morris & E. R. Co. v. Sussex R. Co.*, 5 C. E. Green, 542; *Brown v. Winnisimmet Co.*, 11 Allen, 326, 331; *Monument National Bank v. Globe Works*, 101 Mass. 57; 5 *American Law Review*, p. 272.

² *Boston & P. R. Co. v. Midland R. Co.*, 1 Gray, 340, 359. Shaw, C. J., said: "This, like every other question respecting the powers of railroad companies, must depend on the statutes of the Commonwealth; and very little aid can be derived from English judicial decisions on this subject, because the provisions of their acts of incorporation and their whole course of proceeding differ so much from our own."

³ *Angell & A. on Corp.* § 237.

tially true in England, where railway and certain other corporations are disabled from contracting, in many instances, except with the common seal.¹ The significance which this ancient formality retains in England illustrates the different views of corporate action taken in the two countries.

3. In the United States, corporations generally have the implied power to bind themselves by commercial paper given for legitimate purposes;² but in England the power exists only when it is implied from statute provisions which assume its existence, or is a necessary incident to the kind of business carried on by the corporation; and it is held not to belong to various business corporations, including railway companies, without a specific power in the charter or memorandum of association.³

4. In England, certain companies may be organized under general laws prescribing a "deed of settlement" or "memorandum of association," which takes the place of a charter, and determines their objects, the powers of officers, and other matters concerning their management.⁴ The question whether such a corporation has exceeded its powers, and the question whether the officers have exceeded the authority conferred upon them by the deed or memorandum, are sometimes confused; and the cases which relate to companies thus organized are apt to mislead in inquiries concerning the powers of corporations in this country.⁵

5. The English cases which have given rise to the contention concerning the application of the doctrine of *ultra vires* to corporate

¹ Diggle v. London & B. R. Co., 5 Exch. 442; London Dock Co. v. Sinnott, 8 El. & Bl. 347; Green's Brice's Ultra Vires, Part III. ch. iii. § 2. English statutes, particularly 8 & 9 Vict. ch. 16, § 97, have modified the common-law doctrine.

² Ante, p. 503.

³ Bateman v. Mid-Wales R. Co., L. R. 1 C. P. 499 (1866); Peruvian R. Co. v. Thames & M. M. Ins. Co., L. R. 2 Ch. App. 617; Green's Brice's Ultra Vires, Part II. ch. vi. sect. v.

⁴ "Joint-Stock Companies Act," 7 & 8 Vict. ch. 110, containing eighty sections, with schedules annexed; "The Companies Act, 1862," 25 & 26 Vict. ch. 89; "The Companies Act, 1867," 30 & 31 Vict. ch. 131; Balfour v. Ernest, 5 C. B. n. s. 601; Ernest v. Nicholls, 6 H. L. Cas.

401; Royal British Bank v. Turquand, 5 El. & Bl. 248; British & Foreign Cork Co., *In re*, L. R. 1 Eq. Cas. 231; Fountaine v. Carmarthen R. Co., L. R. 5 Eq. Cas. 316; Riche v. Ashbury R. Carriage & Iron Co., L. R. 9 Exch. 224, L. R. 7 H. L. 653.

⁵ Bissell v. Mich. S. & N. I. R. Co., 22 N. Y. 258, 291, 5 American Law Review (Jan. 1871), 272, 285; 2 Kent Com. 300, note; Green's Brice's Ultra Vires, Part II. ch. i. sect. ii.; "Various meanings that have been given to the term *ultra vires*." The ambiguity of the phrase, as sometimes denoting a mere excess of authority and sometimes an act illegal as *malum prohibitum*, has been noted. Taylor v. Chichester & M. R. Co., L. R. 2 Exch. 356, 370.

contracts have sometimes related to contracts which involved an assumption, without authority of Parliament, by one company of a new enterprise, or a transfer of its own, by means of a contemplated lease, consolidation or joint business, or purchase of shares, or to contracts for applications to Parliament for authority to enter into such arrangements.¹ These are clearly distinguishable from ordinary business contracts, which may or may not be auxiliary to a corporate purpose. Their effect is to change the area of the operations of the company which had been fixed by legislation.²

6. A large proportion of the English opinions on the doctrine of *ultra vires* were given on bills in equity brought by shareholders to restrain the corporation and its officers from breaches of trust and a perversion of the corporate funds to unauthorized uses.³ The just intervention of equity in such cases cannot be used as authority to sustain the defence of *ultra vires* in suits between the parties to the contract. This distinction has been noted in some English opinions.⁴

7. Notwithstanding the voluminous discussion in the English courts of the doctrine of *ultra vires*, it has rarely prevailed as a defence in a suit between the parties to a contract.⁵ The agree-

¹ The following are such cases: *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775; *Macgregor v. Dover & D. R. Co.*, 18 Q. B. 618; *Beman v. Rufford*, 1 Simons, N. S. 550; *Simpson v. Denison*, 10 Hare, 51; *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare, 306; *London, B., & S. C. R. Co. v. London & S. W. R. Co.*, 4 De Gex & J. 362; *Winch v. Birkenhead, L., & C. J. R. Co.*, 5 De Gex & S. 562; *Charlton v. Newcastle & C. R. Co.*, 5 Jur. N. S. 1096; *Gardner v. London, C., & D. R. Co.*, L. R. 2 Ch. App. 201; *Bourgoin v. La Compagnie*, L. R. 5 App. Cas. 381. See *Sevenoaks, M., & T. R. Co. v. London, C., & D. R. Co.*, L. R. 11 Ch. Div. 625.

² The territorial character of certain powers of a railway company is noted by Lord Campbell in *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 441, 442.

³ *Colman v. Eastern Counties R. Co.*, 10 Beav. 1 (1846); *Cohen v. Wilkinson*, 12 Beav. 125 (1849); *Salomons v. Laing*, 12 Beav. 339 (1849); *Bagshaw v. Eastern Union R. Co.*, 7 Hare, 114 (1849), 2 Mac. & G. 389 (1850); *Munt v. Shrewsbury & C. R.*

Co., 13 Beav. 1 (1850); *Beman v. Rufford*, 1 Simons, N. S. 550 (1851); *Simpson v. Denison*, 10 Hare, 51 (1852); *Winch v. Birkenhead, L., & C. J. R. Co.*, 5 De Gex & S. 562 (1852); *Charlton v. Newcastle & C. R. Co.*, 5 Jur. N. S. 1096 (1859); *Hare v. London & N. W. R. Co.*, 2 Johns. & H. 80 (1861); *Forrest v. Manchester, S., & L. R. Co.*, 30 Beav. 40 (1861); 4 De Gex, F. & J. 126 (1861); *Maunsell v. Midland Great Western R. Co.*, 1 Hem. & M. 130 (1863). See *London, B., & S. C. R. Co. v. London & S. W. R. Co.*, 4 De Gex & J. 362 (1859).

⁴ *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 417, 418; *Bateman v. Ashton-under-Lyne*, 3 Hurl. & N. 323, 337; *South Wales R. Co. v. Redmond*, 10 C. B. N. S. 675, 685; *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 378-380. In *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775, equity cases only were relied on. In this case, Maule, J., noted the distinction above referred to. pp. 789, 790, 792.

⁵ It has prevailed as a defence in the House of Lords in a single case, *Ashbury*

ment has been usually sustained as one which the corporation could lawfully make,¹ or the final decision has rested on other grounds; as that the contract was uncertain in its terms or of doubtful construction,² that the proper remedy had not been sought,³ that the rights of the parties had not matured,⁴ that the covenant had not been broken,⁵ or some other points, aside from the doctrine of *ultra vires*, affecting its validity or the rights of parties.⁶ The opinions on the subject are therefore very largely *obiter dicta*; and the disposition to rest the final judgment on other grounds shows a hesitation in admitting the defence.

R. Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653, L. R. 9 Exch. 224. The defence has also been sustained in the following cases in other courts: East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775; Macgregor v. Dover & D. R. Co., 18 Q. B. 618; Great Northern R. Co. v. Eastern Counties R. Co., 9 Hare, 306; Earl of Shrewsbury v. North Staffordshire R. Co., L. R. 1 Eq. Cas. 593.

¹ London & S. W. R. Co. v. South Eastern R. Co., 8 Exch. 584; South Yorkshire R. & River Dun Co. v. Great Northern R. Co., 9 Exch. 55, 3 De Gex, M. & G. 576; South Wales R. Co. v. Redmond, 10 C. B. n. s. 675; Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 331, 3 De Gex & S. 743, 1 De Gex, M. & G. 737; Taylor v. Chichester & M. R. Co., L. R. 4 H. L. 628, 4 Hurl. & C. 409, L. R. 2 Exch. 356; Bateman v. Ashton-under-Lyne, 3 Hurl. & N. 323; Wilson v. Furness R. Co., L. R. 9 Eq. Cas. 28; Midland

R. Co. v. Great Western R. Co., L. R. 8 Ch. App. 841; Attorney-General v. Great Eastern R. Co., L. R. 5 App. Cas. 473, L. R. 11 Ch. Div. 449.

² Webb v. Direct London & P. R. Co., 9 Hare, 129, 1 De Gex, M. & G. 521; Stuart v. London & N. W. R. Co., 15 Beav. 513, 1 De Gex, M. & G. 721.

³ Johnson v. Shrewsbury & B. R. Co., 3 De Gex, M. & G. 914; South Yorkshire R. & River Dun Co. v. Great Northern R. Co., 9 Exch. 55, 3 De Gex, M. & G. 576.

⁴ Shrewsbury & B. R. Co. v. North Western R. Co., 6 H. L. Cas. 113, 2 Mac. & G. 324; 3 Mac. & G. 70, 17 Q. B. 652, 16 Beav. 441, 4 De Gex, M. & G. 115; Scottish North-Eastern R. Co. v. Stewart, 3 Macq. 382.

⁵ Gage v. Newmarket R. Co., 18 Q. B. 457.

⁶ Norwich v. Norfolk R. Co., 4 El. & Bl. 397, where only one judge thought the contract *ultra vires*; *post*, p. 534.

NOTE.

For the convenience of the profession, an abstract of the leading English cases in which the doctrine of *ultra vires* is applied to the contracts of corporations is here given, classified as follows: I. Suits in equity by shareholders to restrain the corporation. II. Suits in equity or at law between the parties to the contract. III. Suits by the Attorney-General to restrain the corporation.

I. *Suits in equity by shareholders to restrain the corporation.*

1. *Colman v. Eastern Counties R. Co.*, 10 Beav. 1 (1846). The points of this case have been sufficiently stated in the text, *ante*, p. 523. For a reference to this case see *South Wales R. Co. v. Redmond*, 10 C. B. N. S. 675, 685.

2. *Cohen v. Wilkinson*, 12 Beav. 125 (1849), 1 Mac. & G. 481 (1849). A railway company was enjoined from carrying out a resolution of the shareholders to construct only a small portion of its entire line and to abandon the rest; the obligation to complete the work being held coextensive with the authority to undertake it. See comments on this case in *Bagshaw v. Eastern Union R. Co.*, 2 Mac. & G. 389, 392.

3. *Salomons v. Laing*, 12 Beav. 339 (1849). A railway company was enjoined from taking shares in another railway company without authority from Parliament; it being bound to apply all its moneys and property to the purposes directed by its Act, and not authorized to divert them to the support of another company having distinct objects.

4. *Bagshaw v. Eastern Union R. Co.*, 7 Hare, 114 (1849), 2 Mac. & G. 389 (1850), 2 Hall & T. 201. Where a company was authorized to raise new capital for a specific purpose, to wit, a branch railway, and the intention of the Act which gave the authority was to keep the new capital separate from the original capital, an injunction was granted at the suit of the holders of the new scrip, to prevent a diversion of such additional capital to the completion of the original line. See *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331, 346; *Taylor v. Chichester & M. R. Co.*, L. R. 4 H. L. 628, 648.

5. *Munt v. Shrewsbury & C. R. Co.*, 13 Beav. 1 (1850). A railway and wharf company, having a station and wharves on a river, and tak-

ing tolls under proper authority, was enjoined from using its funds in the support of a bill in Parliament for improving the navigation of the river; it being considered absolutely and unalterably "decided in the Court of Chancery that companies who are possessed of funds for objects which are distinctly defined by Act of Parliament cannot be allowed to apply them to any other purpose whatever, however advantageous and profitable that purpose may appear to be to the company or to the individual members of the company."

6. *Beman v. Rufford*, 1 Simons, n. s. 550 (1851). A company was enjoined from carrying into effect an agreement which was practically a lease of its railway and a transfer of its whole business to other companies; the Vice-Chancellor holding the agreement to be illegal, and to provide for a railway different from that contemplated by the Act, and saying that "this court will not tolerate that parties, having the enormous powers which railway companies obtain, should apply one farthing of their funds in a way which differs, in the slightest degree, from that in which the legislature has provided that they shall be applied." See reference to this case in *Gregory v. Patchett*, 33 Beav. 595, 606.

7. *Simpson v. Denison*, 10 Hare, 51 (1852). A company was enjoined from carrying out an agreement to work the traffic of another railway company, and pay the expenses of an application to Parliament for a ratifying Act. The Vice-Chancellor, following the analogy of a partnership, stated the principle that a company, formed for the purpose of making a railway between certain places, cannot lawfully make one between other places, or use its moneys for obtaining an Act for a railway between such other places. See comments on this case in *South Yorkshire R. & River Dun Co. v. Great Northern R. Co.*, 9 Exch. 55, 81, 88, where the analogy between a corporation and a partnership is questioned.

8. *Winch v. Birkenhead, L., & C. J. R. Co.*, 5 De Gex & S. 562 (1852). The court enjoined a company from carrying out an agreement which was practically a lease of its railway to another company for ninety-nine years. The Vice-Chancellor thought the agreement "savoured of illegality," and that it was not a simple incapacity in the other company to undertake the working of the railway, but that such an arrangement was against the policy of Acts of Parliament.

9. *London, B., & S. C. R. Co. v. London & S. W. R. Co.*, 4 De Gex & J. 362 (1859). An agreement transferring the exclusive use of the railway, in consideration of an annual sum to be paid, was held illegal. For reference to this case see *Midland R. Co. v. Great Western R. Co.*, L. R. 8 Ch. App. 841, 857.

10. *Charlton v. Newcastle & C. R. Co.*, 5 Jur. n. s. 1096 (1859).

Companies were enjoined from carrying out an agreement, made without authority of Parliament, for a partnership and amalgamation.

11. *Hare v. London & N. W. R. Co.*, 2 Johns. & H. 80 (1861). In this case, the same Vice-Chancellor who decided the preceding case held that an agreement for the division of the profits of the whole traffic in certain fixed proportions was not *ultra vires*, chiefly on the authority of *Shrewsbury & B. R. Co. v. North Western R. Co.*, 6 H. L. Cas. 113.

12. *Forrest v. Manchester, S., & L. R. Co.*, 30 Beav. 40 (1861), 4 De Gex, F. & J. 126 (1861). An injunction was refused on a bill to restrain a railway company, which was authorized to maintain a ferry, from letting boats for excursions when not required for its purposes. The principle declared was, that while a railway company, incorporated as a common carrier between two places, is not authorized to carry on a trade perfectly distinct and separate from that for which it was constituted, it may lawfully own boats which are required on some though not on all days (the traffic being greater on market or other special days), and that, having such boats, it may use them when not required in its business for excursions, or let them for that purpose to others. The Lord Chancellor, on appeal, dismissed the bill, confining himself to the ground that the plaintiff was not a *bona fide* party.

13. *Maunsell v. Midland Great Western R. Co.*, 1 Hem. & M. 130 (1863). An injunction was granted to restrain a company from making a parliamentary deposit for bills promoted by another company, the transaction being held *ultra vires*.

14. *Gregory v. Patchett*, 33 Beav. 595 (1864). This was a suit to annul the proceedings of a shipping company on the ground that they were in excess of its powers; and two grounds of complaint were stated: 1. The company, with a view to facilitate a change in the directory, purchased a large amount of the shares of the capital stock. It was held that this transaction, even on the assumption that it was *ultra vires* of the company, could not be impeached by a minority of the stockholders, who for six years had acquiesced in it. The Master of the Rolls, Romilly, said, "Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is *ultra vires* of the company to which they belong, watching the result: if it be favorable and profitable to themselves, to abide by it and insist on its validity; but if it prove unfavorable and disastrous, then to institute proceedings to set it aside." 2. The company sold three ships, its only available property, to two directors, receiving in payment their stock at the price they had paid the company for it, which was above its market value. The Master of the Rolls held the sale to be void, required the directors to make good the value of the ships, and decreed

the dissolution and winding up of the company. The transaction of the sale of the ships was treated as *ultra vires* of the company, being foreign to its objects, and accomplished by a narrow majority, composed in a great measure of the persons who were themselves interested in the decision. It may be remarked that the sale was voidable on the ground of breach of trust, rather than as *ultra vires* of the company.

15. *Lyde v. Eastern Bengal R. Co.*, 36 Beav. 10 (1866). An injunction was sought to prevent a railway company in India from employing its funds in obtaining from Parliament powers foreign to its purposes as originally established, and from employing steamboats for conveying goods and passengers beyond the limits of its railway. The Master of the Rolls, though thinking some of its acts *ultra vires*, refused the preliminary injunction, giving as reasons for the refusal the distance of the place where the acts complained of were being done, and the probability of parliamentary authority being obtained.

16. *Russell v. Wakefield Waterworks Co.*, L. R. 20 Eq. Cas. 474 (1875). This shareholders' bill sought a recovery of money illegally paid to the promoters of another company, but it was defective in form. A demurrer was sustained, with leave to amend.

II. *Suits in equity or at law between the parties to the contract.*

17. *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775 (1851). The points of this case have been sufficiently stated in the text, *ante*, p. 524. See references to this case in *South Yorkshire R. & River Dun Co. v. Great Northern R. Co.*, 9 Exch. 55, 72, 73; *Bateman v. Ashton-under-Lyne*, 3 Hurl. & N. 323, 337, 339; *Macgregor v. Dover & D. R. Co.*, 18 Q. B. 618, 631; *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 369, 371, 372, 375, 381, 384, 385, 389; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331, 347; *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 412-415, 445; *Ashbury R. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653, 694; *Attorney-General v. Great Eastern R. Co.*, L. R. 11 Ch. Div. 449, 501, L. R. 5 App. Cas. 473.

18. *Webb v. Direct London & P. R. Co.*, 9 Hare, 129 (1851), 1 De Gex, M. & G. 521 (1852). This was a land-owner's bill in equity for the specific performance of a contract, made with him originally by the promoters of the railway, but afterwards adopted by the company, to pay him a certain sum for his land and consequential damages in consideration of his withdrawing opposition to a bill in Parliament for incorporating the company. The railway was abandoned, and no part of the land was taken. Specific performance was decreed, but, on appeal, it was held that, the railway not having been made and the land not being taken, the decree was inequitable, and the land-owner was left to his remedy at law. The agreement itself was also thought to be obscure. This case is similar to *Stuart v. London & N. W. R. Co.*, 15 Beav.

513 (1852), 1 De Gex, M. & G. 721 (1852). For references to these two cases see *Hawkes v. Eastern Counties R. Co.*, 1 De Gex, M. & G. 737, 757-759, 5 H. L. Cas. 331, 351-353, 355, 369, 377, 379; *Gage v. Newmarket R. Co.*, 18 Q. B. 457, 470.

19. *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare, 306 (1851). The court refused to aid by an injunction an agreement which was practically a lease made by one company of its railway to another company, regarding it as an attempt to delegate powers which could be delegated only by authority of Parliament.

20. *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, and the *Shropshire Union R. & Canal Co.*, 2 Mac. & G. 324, 2 Hall & T. 257 (1850), 3 Mac. & G. 70 (1850), 17 Q. B. 652 (1851), 16 Beav. 441 (1852), 4 De Gex, M. & G. 115 (1853), 6 H. L. Cas. 113 (1857). The plaintiff company sought the specific performance of an agreement by the two defendant companies, by which the said two companies, in consideration of the plaintiff's withdrawing opposition to a bill in Parliament, authorizing one of the two defendant companies to take a lease of the railway of the other, agreed with the plaintiff company to conduct their business in a certain manner so as not to injure the plaintiff's business. There was a contention in relation to the construction of the agreement on which the final result turned; but there was much discussion of the question whether the agreement was void as *ultra vires*, or as promoting a monopoly. The cause had a various fortune, and finally (some points having been reserved for an action at law, 17 Q. B. 652) ended in the House of Lords with a decree of dismissal. For references to this case see *Charlton v. Newcastle & C. R. Co.*, 5 Jur. N. S. 1096; *Hare v. London & N. W. R. Co.*, 2 Johns. & H. 80, 112.

21. *Macgregor v. Dover & D. R. Co.*, 18 Q. B. 618 (1852). A person agreed that a railway company, in which he had influence, should, in a certain event, pay the parliamentary expenses of an application by another company to Parliament for a scheme which, if authorized, was to be handed over to the company that was by the agreement to pay the expenses. The court, following *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775, held that this was an agreement to do an illegal act, — one not only beyond the power of the company which was to pay the expenses, but also contrary to public policy and the provisions of an Act of Parliament. For references to this case see *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397, 419; *Eastern Counties R. Co. v. Hawkes*, 5 H. L. Cas. 331, 348; *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 382, 383.

22. *Gage v. Newmarket R. Co.*, 18 Q. B. 457 (1852). The chief contention was as to the construction of an agreement of a company promoting a bill for the extension of its line to pay in a certain event

damages to a party whose land would be severed by such extended line; but there was a dictum of Lord Campbell, C. J., to the effect that the agreement, if absolute, would have been *ultra vires*. For references to this case see *Hawkes v. Eastern Counties R. Co.*, 1 De Gex, M. & G. 737, 758, 5 H. L. Cas. 331, 351; *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 366; *Scottish North Eastern R. Co. v. Stewart*, 3 Macq. 382, 394. Compare *Bland v. Crowley*, 6 Exch. 522. In *Preston v. Liverpool, M., & N. R. Co.*, 5 H. L. Cas. 605 (1856), 1 Simons, n. s. 586, 17 Beav. 114, there was a similar construction of a contract.

23. *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 397 (1855). The defendant company, in constructing its railway across a navigable river, found it impracticable to build a bridge and other necessary works on the site fixed by the parliamentary location; and, without changing the general route, began to construct them at a more convenient point, with the consent of the owners of the adjoining land, and of the Admiralty, but without further authority of Parliament. Being indicted for a public nuisance at the instance of the plaintiffs, a municipal corporation, an agreement was made by which the plaintiffs were, as far as they were interested, to permit the works to remain, and the railway company was to erect them in a certain way, and, with the co-operation of the municipal corporation, to use its best endeavors to obtain an Act of Parliament sanctioning and confirming the agreement. The company made a further covenant to pay the plaintiffs a certain sum as liquidated damages if the works were not completed within twelve months, whether the ratifying act was obtained or not; and upon this covenant the action was brought. An Act of Parliament was obtained, which authorized the works, but did not in terms legalize the agreement or contain a retrospective clause. The judges divided equally on the question whether by proper construction the agreement stipulated for an illegal act, to wit, a public nuisance; but, on the second question, whether it was *ultra vires* as unconnected with the purpose of the incorporation, Lord Campbell alone expressed the opinion that it was void for that reason.

24. *Hawkes v. Eastern Counties R. Co.*, 3 De Gex & S. 743 (1850), 1 De Gex, M. & G. 737 (1852), 5 H. L. Cas. 331 (1855). This was a land-owner's bill in equity against a company, praying for the specific performance of its agreement to buy his land (only a part of which was needed for the proposed scheme), and pay certain damages in the event of its obtaining an Act to authorize a branch railway, which would pass through his estate, he agreeing, at the same time, to withdraw opposition to the proposed Act. The Act having been obtained, the company maintained the agreement to be *ultra vires*, chiefly on the ground that

the land was not required for the railway already authorized, and that the company could not contract to buy land for a line to be hereafter authorized. Specific performance was decreed, it being held that the new line was not foreign to the original enterprise, and the funds of the company would, under the authority of the new Act, be used for it in the same manner as if originally authorized; that, where directors are acting in the obvious line of their duty, their contracts of purchase with a party dealing in good faith are binding on the company although the property bought may be more than is required for the railway; and that the conditional contract, which was to become absolute upon the Act being obtained, was a lawful one. For references to this case see *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 367-369, 372, 382, 386, 388, 392.

25. *South Yorkshire R. & River Dun Co. v. Great Northern R. Co.*, 3 De Gex, M. & G. 576 (1853), 9 Exch. 55 (1853). This controversy, carried on in equity and at law, is not instructive except in the observations of Parke, B., in the Court of Exchequer, on the capacity of a corporation to bind itself by contracts. See *ante*, p. 502. For references to this case see *Charlton v. Newcastle & C. R. Co.*, 5 Jur. n. s. 1096; *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 362.

26. *Johnson v. Shrewsbury & B. R. Co.*, 3 De Gex, M. & G. 914 (1853). This suit related to an agreement by one company to work the line of another; and although there was a suggestion that it was illegal and against public policy, the decision involved only a question of remedy.

27. *Bateman v. Ashton-under-Lyne*, 3 Hurl. & N. 323 (1858). The contract of a water-works company to pay for plans of a proposed extension to be made in view of an application to Parliament for the proper authority was held not *ultra vires*.

28. *Scottish North-Eastern R. Co. v. Stewart*, 3 Macq. 382 (1859). This was, in effect, a land owner's suit for the specific performance of the company's agreement to purchase his land; but the agreement was held to be conditional on the company's executing its line, and that event had not taken place. Lord Wensleydale's remarks on the capacity of a company to bind itself by contract, elsewhere quoted (*ante*, p. 501, *note*), are instructive.

29. *South Wales R. Co. v. Redmond*, 10 C. B. n. s. 675 (1861). The points of this case have already been sufficiently stated, *ante*, p. 509. For reference to this case see *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 386.

30. *Earl of Shrewsbury v. North Staffordshire R. Co.*, L. R. 1 Eq. Cas. 593 (1865). This suit involved, besides a question concerning the power of the promoters to bind a company by contracts made

before its existence, the further question, whether it was bound by an agreement of such promoters, which had been adopted by the directors after its Act had been obtained, to pay £20,000 to a peer for his "countenance and support" in obtaining the Act. The agreement was held to be *ultra vires* of the company; but other grounds of defence might well have been taken, as that such an agreement with a legislator is void as tending to corruption, and that, if not, "countenance and support" is too indefinite a benefit to be the consideration of a contract. For reference to this case see *Taylor v. Chichester & M. R. Co.*, L. R. 2 Exch. 356, 374, 377, 378.

31. *Wilson v. Furness R. Co.*, L. R. 9 Eq. Cas. 28 (1869). The agreement of a railway company to build for certain considerations a carriage-road and wharf was held not *ultra vires*, and was specifically enforced in equity.

32. *Taylor v. Chichester & M. R. Co.*, 4 Hurl. & C. (Court of Exchequer) 409 (1866), L. R. 2 Exch. (Exchequer Chamber) 356 (1867), L. R. 4 H. L. 628 (1870). It was held in this case that the contract of a railway company, reciting its intended application to Parliament for authority to make a new line, by which it agreed with a land-owner, in the event of the bill passing during the session, to build the proposed railway through his land at certain points, to buy his land for a sum stated, and within a specified time after the passing of the bill to pay him a certain other sum as personal compensation for annoyance, inconvenience, and damage in respect of game, he agreeing, upon these terms, to withdraw opposition to the application and sell his land, was binding on the company. The action was upon the covenant to pay the sum fixed as personal compensation which was held absolute on the Act being obtained, although the company had not built the road and the land-owner had not suffered damage. An agreement which, by its terms, was to become operative on the passing of the bill was regarded by virtue of that stipulation as if it had been made after the passing of the bill. The conflict of opinion in this case between different courts and the judges of the same court as to the application of the doctrine of *ultra vires* has already been noted, *ante*, p. 521. The chief ground upon which it was treated as *ultra vires* by some of the judges was that the covenant, being for the payment whether the line was built or not, or the damage done or not, involved a misappropriation of the corporate funds. Compare *Bland v. Crowley*, 6 Exch. 522.

33. *Midland R. Co. v. Great Western R. Co.*, L. R. 8 Ch. App. 841 (1873). The Hereford, Hay, & Brecon Railway Company entered into an agreement with the plaintiff company, by which the latter was to work the former's line, keeping it in repair, appointing and paying officers, and fixing through rates and fares, of which a proportion was

to be paid to the former company. The Master of the Rolls, Lord Romilly, held the agreement *ultra vires* as giving up the sole and entire management of the line and delegating its use and working. This decision was reversed by the Court of Appeal in Chancery, where it was held that the agreement was not in effect a lease, transfer or delegation of powers, but a working agreement which was not illegal or beyond the powers of either company, or against public policy. The consideration that the agreement was not in terms exclusive—the Hereford Company retaining the local traffic, and other companies not being expressly excluded from similar agreements—seems to have had weight in the judgment. The case was distinguished from *London, B., & S. C. R. Co. v. London & S. W. R. Co.*, 4 De Gex & J. 362 (1859), where there was an agreement for an exclusive use.

34. *Riche v. Ashbury Railway Carriage & Iron Co.*, L. R. 9 Exch. 224 (1874), L. R. 7 H. L. 653 (1875). The defendant company was incorporated by a “memorandum of association” under the Joint Stock Companies Act, 1862, the memorandum declaring one of its objects to be “to carry on the business of mechanical engineers and general contractors,” and under this power the directors assumed to buy a concession of the government of Belgium for the construction of a railway in that country, and to contract with parties to build it. It was contended that, even if the directors had exceeded their authority, their acts had been ratified by the shareholders. It was held in the House of Lords that the contract, being of a nature not included in the memorandum, which is the company’s charter, was *ultra vires* not only of the directors but of the company, and, as it was in its inception void, could not be made valid by the subsequent assent of all the shareholders. Some of the Lords, particularly Lord Selborne, showed a strong leaning to the rigid doctrine of *ultra vires* as held in the *East Anglian Railway* case. The case of *Riche v. Ashbury Railway Carriage and Iron Co.* illustrates the conflicts of opinion and embarrassments to which the doctrine as applied to contracts leads, justifying Lord Cairns’s remark, that the history and progress of the action, in which no fact was in dispute, with an active and continuing litigation of seven years, is “not creditable to our [English] legal proceedings.” In the Court of Exchequer two of the three judges were for the plaintiff; and the six judges in the Exchequer Chamber were equally divided, three for the plaintiff on the ground of ratification, and three for the defendant on the ground that the contract was both incapable of ratification and had not been ratified. The result shows that the wearisome discussions on *ultra vires* in the English courts, lasting for a generation, have failed to establish a conclusion which commands the general assent of the judges.

III. *Suits by the Attorney-General to restrain the corporation.*

35. *Attorney-General v. Great Northern R. Co.*, 1 Drewry & S. 154 (1860). An injunction was granted upon an information filed by the Attorney-General on the relation of a stranger to restrain a railway company from carrying on the general business of buying and selling coal, it being held that the company was, by implication, prohibited from carrying on any business other than that for which it was constituted. The public interests were considered to be endangered by the extraordinary means at the command of a railway company for preventing competition and obtaining a monopoly. See as to proceedings by the government in such cases, *Attorney-General v. Great Eastern R. Co.*, L. R. 11 Ch. Div. 449, L. R. 5 App. Cas. 473; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; *Attorney-General v. Boston*, 123 Mass. 460; *United States v. Union Pacific R. Co.*, 98 U. S. 569.

36. *Attorney-General v. Great Eastern R. Co.*, L. R. 11 Ch. App. 449 (1879), L. R. 5 App. Cas. 473 (1880). This was an action of the Attorney-General on the relation of a private person to restrain the defendant company from performing a contract to let its rolling-stock to another company, and from manufacturing rolling-stock for the purpose of so letting it; and the contract was held to be authorized by a local and personal Act of Parliament. Different views were expressed as to the right of the Attorney-General to intervene when the company merely exceeded its powers, but this question was reserved. The right of the company to utilize property not needed for immediate use was also discussed, but the decision was finally made on the terms of the Act of Parliament. In the House of Lords, the Lord Chancellor (Selborne) said: "I assume that your Lordships will not recede from anything that was determined in *The Ashbury Railway Company v. Riche*. It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*." Lord Blackburn said: "That case (*The Ashbury Railway Carriage & Iron Company v. Riche*) appears to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and, consequently, that the Great Eastern Company, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose."

In the Court of Appeal, L. R. 11 Ch. Div. 449, 500, Bramwell, L. J., said: "The first question in this case is whether (setting aside the Statute 26 & 27 Vict. c. 69) the defendants have done, or are doing or threatening to do, something unlawful in the matters complained of. It is said that what they have done, are doing, and threatening to do, is unlawful, — contrary to law. The reason given is that it is *ultra vires*, that they have no power to do it, and that, as they have no power to do it, it is unlawful. To show that they have no power to do it, the Acts under which they are created and constituted are referred to, and, certainly, among the things expressed that they may do is not to be found the letting of locomotives on hire. There is no prohibition of doing it, but there is no permission. It is said that because they are not empowered or permitted, they are prohibited; and that they are, therefore, disobeying an Act of Parliament, and so breaking the law. This is, undoubtedly, contrary to one's general idea that, unlike some countries where it seems as though nothing is lawful save what is permitted, here, in England, everything is lawful save what is prohibited. It is opposed to those free-trade and *laissez faire* notions which are commonly supposed to have something in them, and under the influence of which some people think that England has thriven considerably. It is said by Mr. Brice that this doctrine or notion was first put in operation in the cases of Attorney-General *v.* Great Northern Railway Company (1 Dr. & Sm. 154), and East Anglian Railways Company *v.* Eastern Counties Railway Company (11 C. B. 775). I was counsel for the plaintiff in the latter case. I know none at common law before it in which a trace of this doctrine is to be found, and certainly I was never more surprised than at that decision, — a decision that proceeded on grounds which, with all respect be it said, were erroneous, and led, as I believe they have in other cases, to an erroneous result. The mistake was in not distinguishing that many of the provisions of Acts of Parliament constituting companies are not provisions as between the companies and the public, but agreements among the shareholders *inter se* which constitute their agreement of partnership, their instrument of settlement."

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